AN BINSE ACHOMHAIRC DO CHARTHANAIS
CHARITY APPEALS TRIBUNAL

CAT APPEAL –

CAT2024-004 UNDER SECTION 39 OF THE CHARITIES ACT 2009

Appeal of Gianna Care CLG appeal against Charities regulator decision of 26 September 2024 communicated by letter 10 October 2024 refusing the application to be registered in the register of charities.

Determination in relation to the hearings held 12 March 2025 and 9 July 2025 in relation to a preliminary application that two members of the tribunal recuse themselves and not partake in the hearing of the appeal.

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THE CHARITIES TRIBUNAL AND MEMBERSHIP

1. The Charity Appeals Tribunal ("**the Tribunal**") was established under Section 75 of the Charities Act 2009 ("**the Act**"). The Tribunal is a statutory body established with effect from 1 August 2016. The function of the Tribunal is to hear and adjudicate on appeals against certain decisions of the Charities Regulator, under Section 45 of the Charities Act 2009.

2. The members of the Tribunal at the time of the hearing of the Appeal were:

   - Mr. Patrick O'Connor, Solicitor (Chairperson),
   - Ms. Nuala Dockry, Barrister
   - Ms. Karen Horgan, Charities Expert
   - Ms. Carol Fawsitt, Retired Solicitor, and
   - Dr. Bill Holohan, Solicitor and Senior Counsel.

THE APPELLANT CHARITY

3. The name and address of the Appellant Charity is **GIANNA CARE CLG** ("**the Appellant**") having a registered office at 46 Parnell Square West, Dublin, Dublin 1.

THE RESPONDENT AUTHORITY

4. The Respondent Authority ("**the Authority**") is the Charities Regulatory Authority established under section 13 of the Act.

BACKGROUND TO THE APPEAL

5. Prior to the establishment of the Act and in particular its Part 3 (section 39) which came into operation on 16 October 2014, there was no requirement for any charitable organisation operating in the State to register with any government authority. Those who had, as of this October 2014 date, an entitlement to an exemption under section 207 or section 208 of the Taxes Consolidation Act 1997 and held a Charity (CHY) number provided by the Revenue Commissioners, were deemed to be automatically registered in the Register of Charities ("**the Register**") established under section 39 of the Act. Such bodies were not obliged to apply for registration under the Authority's registration process. At no time did the Appellant hold an exemption from the Revenue Commissioners.

6. The Appellant was established/incorporated on Friday the 18th of May 2012. Their address registered with the Companies Registration Office at the time of the Appeal was 46 Parnell Square West, Dublin, Dublin 1.

7. The Appellant submitted its initial application ("**The Application**"), on 3 February 2021, Submission Number SR 42609.

8. The Application by the Appellant was revised on:

- 20 May 2021,
- 3 November 2021,
- 27 February 2023,
- 4 April 2023,
- 2 May 2023, and
- 17 October 2023.

11. By email from the Regulator to the Appellant on 20 May 2021, receipt of the Application was acknowledged.

12. By email dated 23 June 2021 at 14:35 hours, from the Regulator to the Appellant, reference was made to amending the Main Object in the Constitution to ensure that they would make the same amendment to the Main Object in the Application Form. The Appellant was also asked to verify the bank account details.

13. By email of 27 July 2021, at 08.54 hours from Cormac Ó Ceallaigh Solicitor for the Appellant, the Regulator was requested to respond to previous correspondence.[1] On the same day, 12:42 hours, the Regulator responded to Mr. Ó Ceallaigh confirming that the submission was returned on 23 June 2021. He was requested to make "*the suggested amendments and resubmit*".

14. On 31 August 2021 at 15:17 hours, a reminder was issued to the Appellant indicating that the required resubmission was overdue, and the Appellant was requested to resubmit within 21 days.

[1] It is unclear what previous correspondence was being referred to.

15. On 2 November 2021 at 17:21 hours, the Regulator responded to Mr. Ó Ceallaigh indicating that the submission was returned as the bank account details did not appear to be correct, and resubmission within 21 days was requested.

16. On 8 December 2021 11:39 hours the Regulator wrote to Mr. Ó Ceallaigh confirming that the application had been progressed to the charities test stage of the application process and a number of issues were raised and certain documentation requested including

– Risk Assessment procedures, safety checks and vulnerable adults safeguarding policy,
– The Appellant's Constitution,
– revision of the Constitution to include certain standard clauses,
– revision of the Main Objects clause of the constitution,
– statement as to the Charitable Purpose and objectives,
– evidence as to statutory requirements and regulations, accreditation for the registered medical practitioner and accredited counselling practitioner and registered counsellors whose services were being availed of,
– beneficiary selection policy/concession policy, in particular information in relation to dealing with oversubscription,
– social media list,
– details in relation to the property utilised by the Appellant,
– bank statements of the previous six months,
– Income and Expenditure information,
– Latest available unabridged Financial Statements,
– information in relation to salaries paid to personnel employed,
– information in relation to trustees, and
– a dated and signed Conflicts of Interest policy.

The Appellant was requested to resubmit within 21 days.

17. On 25 February 2022 at 14:05 hours, by email from the Regulator to Mr. Ó Ceallaigh he was advised that resubmission was overdue and resubmission within 21 days was requested.

18. On 4 April 2022, 14:19 hours, by further reminder from the Regulator to Mr. Ó Ceallaigh he was reminded that the resubmission was overdue, and he was requested to resubmit within 14 days.

19. On 17 October 2022, by email from the Regulator to Mr Ó Ceallaigh, a re-submission, received on that date, was acknowledged.

20. On 31 January 2023, 16:59 hours by email from the Regulator to Mr Ó Ceallaigh, he was advised that Meagan Gill, Head of Registration, would like to meet with representatives of the Appellant.

21. On 9 February 2023, a meeting between the Staff of the Regulator and representatives of the Appellant took place.

22. Afterwards, at 17:02 hours, by email from the Regulator to Mr Ó Ceallaigh, Mr. Ó Ceallaigh was requested to progress the application, which had been reactivated. The Appellant was again requested, inter alia, to upload the risk assessment procedures, safety checks and vulnerable adults safeguarding policy, and other requirements as previously documented. Thereafter, Trustee Declarations and accounts et cetera were submitted.

23. On 13 March 2024, the office of the Regulator wrote to Mr. Ó Ceallaigh regarding amendments to the Constitution, details of charitable purpose, and social media accounts.

24. On 4 April 2023 the office of the Regulator wrote to Mr. Ó Ceallaigh by way of reminder regarding outstanding queries.

25. On 12 April 2023 the office of the Regulator wrote to Mr. Ó Ceallaigh regarding a lack of evidence in the Companies Registration Office's records to indicate that the Appellant has taken the appropriate actions as provided for in Section 1180 of the Companies Act 2014 to dispense of the wording Company Limited by Guarantee. Mr. Ó Ceallaigh was again requested to submit details of the Appellant's social media accounts to include its Facebook and Twitter accounts.

26. On 26 July 2023 by email at 14.11 hours the office of the Regulator wrote to Mr. Ó Ceallaigh regarding the re-submitted application and raised a query regarding the statement at page 6 of the Business Plan that women availing of Gianna Care services may also avail of a non-diagnostic ultrasound scan during a visit to the Gianna Care Dublin centre and that ultrasound scans were performed by a volunteer who is a registered medical practitioner. Mr. Ó Ceallaigh was asked to explain what was meant by "*non-diagnostic*" nature of the scans and to explain the purpose of the non-diagnostic ultrasound scan. A number of queries were raised in relation to the scanning procedures and the personnel involved.

27. On 15 August 2023 at 15.40 hours Mr. Ó Ceallaigh acknowledged receipt of the queries.

28. On 6 October 2023 at 14.28 hours a reminder issued to Mr. Ó Ceallaigh and his response was requested.

29. On 10 October 2023 at 11.28 Mr. Ó Ceallaigh acknowledged receipt of the reminder.

30. On 17 October 2023 by letter from Mr. Ó Ceallaigh he responded to the queries.

31. On 31 October 2023 by email at 08.36 the office of the Regulator wrote to Mr. Ó Ceallaigh with regard to the nature of HSE foetal scanning procedures and policies and the scans being diagnostic in nature and not complying with HSE guidelines and the possibility of harm resulting.

32. On 14 December 2023 by email at 08.42 from the office of the Regulator to Mr. Ó Ceallaigh a reminder was issued and at 10.19 hours Mr. Ó Ceallaigh indicated he was awaiting approval by his client of a reply.

33. On 4 January 2024 Mr. Ó Ceallaigh responded to the Regulator regarding the issue of the diagnostic nature of the scans.

34. On 18 January 2024 by email at 08.33 the office of the Regulator wrote to Mr. Ó Ceallaigh regarding the conducting of foetal scans and standards to be observed and the correlation to the charitable objects of the Appellant. A re-submission of the Application within 21 days was stated to be required.

35. On 5 March 2024 by email at 12.33 the office of the Regulator wrote to Mr. Ó Ceallaigh by way of reminder.

36. On 4 April 2024 Mr. Ó Ceallaigh responded indicating that the Appellant no longer has any medical personnel directly engaged with its work, either doing scans or offering advice on scans, and Mr. Ó Ceallaigh stated that the Appellant was willing to provide a written undertaking to only use third party scanning service providers committed to all applicable standards and using only suitably qualified sonographers.

37. On 26 June 2024 Mr. Ó Ceallaigh responded to the office of the Regulator and on 27 June 2024 the Regulator acknowledged receipt.

38. On 27 June 2024 by email at 09.55 hours, the office of the Regulator wrote to Mr. Ó Ceallaigh and on 23 September 2024 at 09.55 sent a reminder.

39. By written notice dated 28 May 2024 the Authority notified the Appellant that the Registration Unit intended to recommend to the Charities Regulator that the application be refused and enclosed the Notice of Intention to Recommend Refusal.

40. The Notice of Intention to recommend refusal, inter alia stated as follows:

> *"2. The Charities Act 2009 (the "Act") sets out the definition of a charitable organisation and the requirements an organisation must meet in order to be registered in the Register.*
>
> *3. Section 2(1) of the Act defines a charitable organisation as one that "promotes a charitable purpose only". Section 3(2) of the Act states that a "*purpose shall not be a charitable purpose unless it is of public benefit*". Therefore, in order to be charitable, an organisation must only promote a charitable purpose for the public benefit.*
>
> *4. It is the view of the Registration Unit that the Appellant does not promote a charitable purpose for the public benefit.*
>
> ***<u>Public Benefit Assessment</u>***
>
> *5. The Appellant's selected charitable purpose is the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health or disability. The Appellant's constitution provides that its main object is:*
>
> > *"*to offer care and support and to reach out to every woman experiencing an unexpected pregnancy by offering real, practical and tangible support based on the individual woman's needs and a wide range of non-judgemental, discreet and confidential services. Gianna Care services are carried out primary (sic) in Dublin but it also reaches out to service users through the country*".*
>
> *6. The Appellant stated that its intended public benefit / outcome it is set up to achieve is "*providing support and comfort to women in crisis pregnancies or who are post abortion*".*

7. *Section 3(2) of the Act provides that "*a purpose shall not be charitable unless it is of public benefit*". Therefore, while an activity or a purpose may appear charitable, a public benefit assessment must be undertaken to ensure that the activities and purpose are in fact charitable.*

8. *When assessing public benefit, it is essential to examine the organisations activities and how these activities may give rise to a public benefit. We also consider whether the activities may cause harm or have the potential to cause harm.*

9. *Harm is the opposite of benefit and can be inadvertent and unintentional. Sometimes an organisation's activities can cause harm instead of or in addition to creating a benefit. Where there is a likelihood of harm occurring, we will take this into account, and we will assess whether the harm or potential harm outweighs the public benefit.*

10. *One of the Appellant's activities is providing a free ultrasound scans to women in crisis pregnancies. The Appellant offered ultrasound scans from 2013 in its Dublin office. It also outsourced some scans. However, in response to queries raised by the Registration Unit in July 2023, the Appellant, in October 2023, stated "*In recent months it has been formally decided [sic] to outsource all ultrasound scans so they are no longer carried out" *by the Appellant. The Appellant referred to these type of ultrasounds scans as* "Non-diagnostic" *and instead calling them a* "keepsake" *scan and that they are distinct from a medical or diagnostic scan.*

11. *The Appellant has maintained that the scans are purely non-diagnostic and for keepsakes only. Furthermore, the Appellant has no policies or documented procedures in place in relation to referrals for ultrasound scans. The Appellant was asked to confirm that it would put in place a clear written policy and procedure dealing with the selection criteria and referrals for scans, the selection of third party scanning providers and a written agreement or protocol with the providers. In response the Appellant provided a document entitled '*Gianna Care CLG Policy for the use of charitable funds to purchase scanning services*' (the "Policy").*

12. *The Policy does not address the matters raised by the Registration Unit. Instead the Policy is akin to a submission on the Appellant's charitable purpose and how the use of the Appellant's funds to pay for ultrasound scans advances its charitable purpose.*

13. *The Policy states that an offer of an ultrasound scan may arise where a pregnant woman makes a request for one, or at the end of a detailed consultation. The content of the Policy contradicts the position previously maintained by the Appellant in relation to the purpose of the ultrasound scans. Contrary to the previous assertion that the scans were non-diagnostic '*keepsakes*', the Policy sets out different purposes for which referrals for scans might be made and states that "*scans may be used diagnostically or non-diagnostically depending on what they show*".*

14. *The Policy goes on to state that the purposes for which a scan is obtained. Scans are provided:*

- *if it is considered that it would be helpful to the pregnant women in coming to a decision;*
- *because the increased awareness and connection that the scans provide are a key component of the Appellant's work;*
- *where a pregnant woman is distressed or concerned about the development of her pregnancy particularly where it relates to possible ill health or disability;*
- *because access to early scans allow clients to receive immediate emotional support and counselling.*

15. *On this latter point it is of note that pregnant woman can, by the Appellant's own submission, be referred for an ultrasound scan and never engage again with the Appellant.*

16. *The Appellant in its correspondence of April 2024 stated that it "*no longer has any medical personnel directly engaged with its work either doing scans or offering advice on scans.*" Despite this statement, the Appellant continues to send women in crisis pregnancies to third parties for an ultrasound scan for the above reasons. It appears now that the Appellant is carrying out this activity, i.e. referrals for diagnostic and non-diagnostic scans, and there is no reference to medical personnel being involved in the decision to refer and without any follow up process or protocol in place.*

17. *In the course of its engagement with the Appellant on the provision of ultrasound scans, the Appellant was referred to the National Clinical Practice Guideline — The Fetal* (sic) *Anatomy Ultrasound published by the HSE. The Appellant denied that this guideline was applicable to the non-diagnostic scans that it carried out, and that the guideline only refer to scans 'typically carried' out at 18-22 weeks and at the same time it notified the Registration Unit of its decision not to carry out the scans in-house anymore. However the Appellant now appears to accept that it*

does refer pregnant women for diagnostic scans, including in relation to possibility of 'ill health or disability',5 which would mean that it should ensure that the third party service provider is an appropriate clinical setting and adheres to the HSE guideline.

18. *Notwithstanding the fact that the Appellant has moved away from providing ultrasounds scans itself and is now using third party providers only, the Registration Unit, in October 2023, raised the fact that there was a potential for harm in the absence of selection criteria for referrals or for the selection of scanning providers or a written agreement or protocol with the providers. The Registration Unit offered the Appellant an opportunity to address this issue.*

19. *The Appellant replied in April 2024 with a letter providing information and the Policy, referred to as being a draft. In this correspondence the Appellant indicated a willingness*

> "to provide a written undertaking to only use third party scanning service providers committed to all applicable standards and using only suitably qualified sonographers. However, they cannot guarantee that they will be able to secure written agreements or protocols with each such provider as it is beyond their power to bind a third party to them contractually but they will certainly use their best endeavours to secure such written agreements/protocols. A written undertaking as to which companies they use is within their control and they are very happy to provide this."

20. *The Registration Unit is not satisfied with the Appellant's stated position on securing written agreements or protocols with ultrasound scan providers. The Appellant's services include sending vulnerable women in crisis pregnancies to third party service providers without medical advice. It is incumbent upon the Appellant to ensure these service providers adhere to the highest standards and clinical guidelines where applicable. If a service provider is not willing to do so the Appellant has the option of not using such service provider and engaging a service provider that does adhere to the required standards and is willing to enter into a written agreement with the Appellant in relation to referrals. The absence of a written agreement or protocol with third party ultrasound scan suppliers increases the risk of harm being caused to pregnant women in crisis pregnancies.*

21. *The Registration Unit is of the view that the ultrasound scans are more than keepsake scans, and can be used for diagnostic purposes. This is reinforced by the Appellant's Policy and its website which states* "Ultrasounds are helpful to determine how long you have been pregnant, as well as

help identify any potential concerns associated with your pregnancy."' *Despite considerable engagement on this issue since July 2023, it is not clear to the Registration Unit, what the actual purpose of the scans is or the criteria for referral (i.e. is everyone who asks for a scan sent for a scan). It is not clear where the scans will take place. It is not clear what the scans will be used for. It is not clear how the pregnant women are protected and supported in this context both before and after the scan.*

22. *As noted above, the Appellant states that the public benefit it is set up to achieve is "*providing support and comfort to women in crisis pregnancies or who are post abortion*". However, even though the Appellant, provides services to women in crisis pregnancy, whom the Appellant itself describes as vulnerable, it has no clear policy on who it sends for ultrasound scans and how such ultrasound scans are used. Furthermore, it does not have written agreements with the third party service providers that it sends these women to for scans despite the fact that some of the scans carried out may be diagnostic in nature. Despite its stated intention of providing support and comfort to women in crisis pregnancy, the Appellant is exposing these women, whom it describes as vulnerable, to the risk of harm by its failure to have protections in place in relation to its use of ultrasound scans in the provision of its service.*

23. *It is the view of the Registration Unit that the potential for harm that this gives rise to outweighs the potential public benefit of the overall service. In such circumstances the Registration Unit is not satisfied the Appellant has demonstrated that it meets the public benefit element requirement in section 3 of the Act.*

24. *For the reasons outlined above the Registration Unit is not satisfied that the Appellant is a charitable organisation within the meaning of the Act."*

41. The Appellant was provided with the opportunity to respond to the Notice if it was of the opinion that there had been an error of law, a factual inaccuracy or if the Notice had misrepresented any of the facts of the application. The Appellant, by means of letter from Mr. Ó Ceallaigh Solicitor on behalf of the Appellant, responded to the Notice on the 27 June 2024 (the "*Response*") in the following terms:

“Thank you for your email of the 28 of May, the contents of which we note.

The Appellant has been operating for 13 years and during that time has provided services and support to those members of the public who contact them and which they otherwise would not have access to. These are, for the most part, women who are or may be pregnant in circumstances which are very challenging or difficult and which is unplanned but at times referrals have also been made by other agencies such as Respond, Focus Ireland, Preparing for life, EPIC (Empowering People In Care), various homeless charities as well as social workers around Ireland. They have also taken referrals from some maternity hospitals in the past and helped TUSLA. The Appellant is not aware of any complaint having been received from past or current clients or from any of the organisations and agencies they have assisted during the past 13 years, nor have the CRA Registration Unit put forward any such evidence. This is evidence of a clear and demonstrable public benefit.

The following are the clients replies to your specific points.

1) *Paragraph 8 says that "[w]*hen assessing public benefit ...re also consider whether the activities may cause harm or have the potential to cause harm*".*

   *The Charities Regulator's Guidance entitled "*What is public benefit*" states at Page 9*

   > *"*[iv]. When we assess an application to register as a charity as part of our compliance and enforcement work we consider its activities. In particular we consider if they cause harm...*".*

   *The difference in the wording is highlighted for ease of reading. There is a different standard in each; the former (Paragraph 8) allows for a degree of speculation and potentiality but the latter (Charities Regulator's Guidance) requires that evidence of actual harm be available in the weighing up of benefit and harm by the activities of an Appellant. We also note that '*harm*' is not defined in the Charities Act. You have not tendered any evidence of examples of harm that could be caused by the client.*

2) *Paragraph 9 says that "[h]arm is the opposite of benefit and can be inadvertent and unintentional. Sometimes an organisation's activities can cause harm instead of or in*

addition to creating a benefit. Where there is a likelihood of harm occurring, we will take this into account, and we will assess whether the harm or potential harm outweighs the public benefit"

*Again, the wording in The Charities Regulator's Guidance, "*What is public benefit*" is different. It states at Page 9,*

> 'Harm is the opposite of benefit. Sometimes an organisation's activities can cause harm instead of benefit. There is a likelihood of harm occurring, we will take this into account and we will assess whether the public benefit outweighs the harm*".*

*Your letter suggests that harm "*can be inadvertent and unintentional*" but these words are not in the Guidance which states that the activities must actually cause harm or be likely to do so and even then, the public benefit may still outweigh any such harm and not preclude the activities.*

3) *Paragraphs 10-17 & 21 refer to the nature of the ultrasound scans which the Appellant arranges and pays for on behalf of their clients. This has been the subject of detailed correspondence between the Appellant and the CRA Registration Unit to attempt to clarify that the scans arranged by the Appellant are not, nor intended to be, diagnostic in nature. These scans are not the same as the clinical fetal* (sic) *diagnostic scans provided as part of maternity obstetric medical care. They are a non-invasive imaging scan to tell the woman how many weeks pregnant she is and to detect a fetal* (sic) *heartbeat. The scanning providers are all professional companies who use qualified sonographers and adhere to all applicable clinical standards and if they should detect anything which may be of possible concern and require clinical investigation, they will inform the woman accordingly and advise her to seek obstetric care in a maternity hospital to do a clinical scan.*

There was no intention in the draft Policy to contradict anything said previously, but merely to cover the reality that even a non-diagnostic scan, commonly referred to as a "keepsake scan" might reveal something which requires further clinical investigation, and it would be remiss of any sonographer not to make a woman aware of this.

4) *Paragraphs 17-18 and 21: The Appellant maintains that the HSE's National Clinical Practice Guideline - The Fetal* (sic) *Anatomy Ultrasound specifically relates to the standard anomaly scans carried out as part of clinical maternity care at 18-22 weeks. This is according to the wording of the Guideline itself; it is not merely the Appellant's opinion. The Guideline contains many detailed requirements for the carrying out of transvaginal scans which must be done in an appropriate clinical setting.*

*We note you disagree and state that the scans arranged by the Appellant "*can be used for diagnostic purposes*". However, none of the scanning providers used by the Appellant would use these scans to diagnose anything with regard to the foetus, other than gestation stage reached and on occasion suggest the need for full clinical diagnostic investigation. This is very different in nature to the transvaginal scans covered by the Guideline and you appear to quantify harm partly by equating the two and requiring that "*medical personnel *[be]* involved in the decision to refer and without any follow up process or protocol in place*". The Appellant disputes this as a matter of fact.*

5) *Paragraph 18: In the course of its application to become registered as a charitable organisation, the Appellant has been working hard to improve and formalise all of its operations and management systems generally to meet the requisite standards in all these areas while remaining open and continuing to provide its services. The whole area of scanning has gradually changed and become more regulated since the Appellant began and has responded to these changes accordingly.*

6) *Paragraph 19: You raised a number of issues regarding scanning, including requesting a clear written policy and procedures be put in place. The Appellant has written a policy and is in the process of preparing a list of Procedures and would be willing to continue to work with the CRA to refine these to achieve an acceptable form of wording. The Procedures document is intended to cover the specific matters which the CRA require to be addressed, namely selection criteria, selection of third party scanning providers and, to the best of the Appellant's ability, written agreements/ protocols with such third parties. In the Appellant's mind, there needed first of all to be a consensus with the CRA on the nature of the scans arranged by the Appellant and on what does or does not constitute "harm" to clients and a workable Procedures document would follow on from that consensus, including obtaining written agreements and protocols with said third parties.*

7) *Paragraph 20: For the avoidance of doubt, the Appellant will only ever use a scanning provider which adheres to all applicable clinical standards and will always verify that this is so. In fact, one provider has told the Appellant that all such companies must conform but in any event the Appellant always checks this with each company. The securing of a written agreement or protocol is something the Appellant will seek to secure and for the vast majority of clients, it should be possible to secure.*

The qualification to the undertaking was to allow for the occasional situation where a client might not be able to travel far from their home or accommodation for work or personal reasons and the Appellant would try to accommodate them by using a more convenient local scanning provider who might not be willing to enter into such an agreement or protocol with the Appellant for whatever reason. But if a blanket undertaking is required, the Appellant would be willing to agree to this.

8) *Paragraph 22: The Appellant offers a comprehensive range of services and support to women in crisis pregnancy and after the baby is born, including pregnancy tests, family support, baby equipment and materials, baby and children's (for young siblings) clothes, counselling, and financial support (as funds allow). They also offer post-abortion support to those who may struggle after an abortion.*

The offer of a scan is just one service which clients are often aware of as it is listed on their website. It is typically offered at some stage to most clients -perhaps they ask for it and for others, it may be offered after some time in a meeting with a counsellor. Each client is different, and her circumstances vary so great sensitivity is required in this area. This is something which the Appellant would wish to reflect in the Procedures to avoid a mechanical 'tick box' exercise. Some clients may be deemed 'vulnerable' depending on their personal circumstances, as they relate their story, but this is not always or automatically the case which is important to note. The client is always the one who controls the decision to have a scan and what her next step is thereafter. There is a follow up call made to each client, but she is under no obligation to accept any further input from the. Appellant.

In summary, the Appellant disagrees with the CRA's Registration Unit's classification of the ultrasound scans it arranges for clients as diagnostic and therefore requiring a medical referral and follow up, and therefore that the National Clinical Practice Guideline - The Fetal Anatomy Scan applies to them.

The Appellant disagrees that this type of non-diagnostic scan is or may be harmful to women. They are available to all women in Ireland and the companies which perform them are accredited, use only qualified sonographers and comply with all applicable clinical guidelines in Ireland. No evidence of any harm being caused to women by such scans has been put forward by the CRA Registration Unit, nor is the Appellant aware of any such harm to any client. If they were, they would cease to offer scans. Indeed, the opposite is more often the Appellant's experience in dealing with thousands of women over the last 13 years.

Subject to consensus being achieved on the above two paragraphs, the Appellant has been and remains willing to collaborate with the CRA. to create a sound Policy and Procedures for ultrasound scans which reflects the considerable experience gained in the area of crisis pregnancy counselling and support as to the help and benefit they provide to women in crisis pregnancy. Hence the Policy submitted was in draft form only, for further consideration and feedback.

The CRA's Registration Unit has focused on one aspect only of the Appellant's range of services, non-diagnostic ultrasound scans, and on this ground alone has decided that the Appellant fails the public benefit assessment test completely and is not a charitable organisation. The Appellant disagrees that this decision is a reasonable one to come to, according to the standard of assessment of benefit and harm as stated in the Charities Regulator's Guidance (page 9). The Appellant has a clear track record of operating in the area of crisis pregnancy counselling, with many women attesting to the huge support and benefit to them of all the supports and services given to them.

The CRA Registration Unit has not given adequate weight to the 13 years of crisis pregnancy counselling and support and the full range of its activities in coming to their decision to recommend refusal of the Appellant's application but has given undue weight

in its consideration of harm from ultrasound scans, which harm has not been demonstrated with evidence as being real, actual or likely to occur.

9) *Paragraph 23 the CRA Registration Unit's Notification letter states that the "*potential for harm*" of the ultrasound scans outweighs "*the potential public benefit of the overall service*" whereas the requisite assessment standard in the Charities Regulator's Guidance is actual harm instead of benefit, or the likelihood of harm which can nevertheless be outweighed by the benefit. The Appellant submits that a proper assessment according to this standard ought to weigh in its favour.*

If you are relying on any specific information or examples of potential harm that may be caused our client should be afforded an opportunity to respond to same

We are satisfied Section 3 of the. Charities Act as regards charitable 'purpose' and 'benefit' is met by the Appellant.

Yours faithfully,

Cormac Ó Ceallaigh
Cormac O. Ceallaigh & Co."

Supporting documentation was also submitted.

42. By letter dated 10 October 2024 from the Regulator to the Appellant, the letter confirmed that on 26 September 2024 the Board of the Charities Regulatory Authority ("**the Board**") refused the application to be registered. At paragraph 3 of the Decision, it was indicated that the Board was of the view that Gianna Care CLG (the "**Appellant**") had not demonstrated that it meets the public benefit criterion to be entered in the Register.

The Decision stated:

“Decision to Refuse

1. *The Charities Act 2009 (the **"Act")** sets out the definition of a charitable organisation and the requirements an organisation must meet in order to be registered in the Register of Charitable Organisations (the **"Register").***

2. *Section 2(1) of the Act defines a charitable organisation as one that "promotes a charitable purpose only". Section 3(2) of the Act states that a "purpose shall not be a charitable purpose unless it is of public benefit". Therefore, in order to be charitable, an organisation must only promote a charitable purpose for the public benefit.*

3. *The Board of the Charities Regulatory Authority (the **"Board")** is of the view that the Gianna Care clg (the **"Appellant")** has not demonstrated that it meets the public benefit criterion to be entered in the Register.*

Background to the Application

4. *The Appellant was issued a Notice of Intention to Recommend Refusal (the **"Notice")** dated 28 May 2024 by the Registration Unit, which set out the reasons the Registration Unit was of the view that the Appellant's application for entry in the Register should be refused. The Appellant was provided with the opportunity to respond to the Notice if it was of the opinion that there had been an error of law, a factual inaccuracy or if the Notice had misrepresented any of the facts of the application. The Appellant responded to the Notice on the 27 June 2024 (the **"Response").***

5. *The Board's decision to refuse is based on the application form and supporting documentation uploaded on the online portal. The Response was also considered by the Board.*

Public Benefit Assessment

6. *Section 3(2) of the Act provides that "*a purpose shall not be charitable unless it is of public benefit*". Therefore, while an activity or a purpose may appear charitable, a public benefit assessment must be undertaken to ensure that the activities and purpose are in fact charitable within the meaning of the Act.*

7. *The Appellant's selected charitable purpose is the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health or disability. The Appellant's constitution provides that its main object is:*

> "to offer care and support and to reach out to every woman experiencing an unexpected pregnancy by offering real, practical and tangible support based on the individual woman's needs and a wide range of non-judgemental, discreet and confidential services..."

8. *The Appellant stated that its intended public benefit is "*providing support and comfort to women in crisis pregnancies or who are post abortion*".*

9. *The Appellant, amongst other things, provides free ultrasound scans to women in crisis pregnancies, whom the Appellant itself describes as vulnerable. The Appellant offered ultrasound scans from 2013 in its Dublin office. It also outsourced some scans. However, in response to queries raised by the Registration Unit in July 2023, the Appellant, in October 2023, stated "*In recent months it has been formally decided [sic] to outsource all ultrasound scans so they are no longer carried out*" by the Appellant in its Dublin office. The Appellant referred to the ultrasounds scans provided as "*Non-diagnostic*" and "*keepsake*" scans stating that they are distinct from a medical ultrasound scans or diagnostic ultrasound scans.*

10. *During the application process it was apparent that the Appellant had no documented policy or procedure in place in relation to the provision of ultrasound scans. The Registration Unit provided the Appellant an opportunity to put in place a clear written policy and procedure dealing with the selection criteria and referrals for scans, the selection of third party scanning providers and a written agreement or protocol with the providers. The Registration Unit also stated that the Appellant should have clear criteria for the spending of charitable money on ultrasounds and how this advanced its charitable purpose.*

11. *The Appellant provided a document "*Gianna Care CLG Policy for the use of charitable funds to purchase scanning services*" which was in draft form (the **"Policy").***

12. *The Policy stated that an offer of an ultrasound scan may arise where a pregnant woman makes a request for one, or at the end of a detailed consultation. The*

*content of the Policy contradicts the position previously maintained by the Appellant in relation to the purpose of the ultrasound scans. Contrary to the previous assertion that the scans were non-diagnostic '*keepsakes*', the Policy sets out different purposes for which referrals for scans might be made and stated that "*scans may be used diagnostically or non-diagnostically depending on what they show*".*

13. *The Policy went on to state the purposes for which a scan is obtained. Scans are provided:*

    - *if it is considered that it would be helpful to the pregnant women in coming to a decision;*
    - *because the increased awareness and connection that the scans provide are a key component of the Appellant's work;*
    - *where a pregnant woman is distressed or concerned about the development of her pregnancy particularly where it relates to possible ill health or disability;*
    - *because access to early scans allow clients to receive immediate emotional support and counselling.*

14. *On this latter point it is of note that pregnant woman can, by the Appellant's own submission, be referred for an ultrasound scan and never engage again with the Appellant. The Appellant in its correspondence of April 2024 stated that it "*no longer has any medical personnel directly engaged with its work either doing scans or offering advice on scans.*"' Despite this statement, the Appellant continues to send vulnerable women in crisis pregnancies to third parties for an ultrasound scan for the above reasons. It appears now that the Appellant is carrying out this activity, i.e. referrals for diagnostic and non-diagnostic scans, and there is no reference to medical personnel being involved in the decision to refer and without any follow up process or protocol in place. The absence of such a policy and procedure detracts from the potential public benefit.*

15. *In order for an organisation to fall within the definition of a charitable organisation, it must provide a public benefit. During the application process an Appellant must be able to demonstrate that it meets the public benefit*

criterion. One way of demonstrating that the Appellant meets the public benefit requirement is to have written procedures in place as to how its services are used, how it provides its services and any follow up with vulnerable women who avail of its services.

16. *The Registration Unit provided the Appellant ample opportunity to provide such a policy but none was provided. Instead, the Appellant provided the Policy and referred to it as being a draft. Following the Notice, the Appellant stated in the Response that it* "remains willing to collaborate with the *[Charities Regulator]* to create a sound Policy and Procedures for ultrasounds*" and that* "the Policy submitted was in draft form only, for further consideration and feedback*".*

17. *The engagement with the Appellant on this point has been drawn out and contradictory. The simple point being made is that because the Appellant is providing an ultrasound scanning service to vulnerable women, with the scans capable of being diagnostic in nature, a policy should exist for the use of such scans and follow up with those who have availed of such scans.*

18. *The Appellant has been in existence for 13 years apparently without a policy or procedure around the use of ultrasounds or how to provide care and follow up to vulnerable women who may avail of such a service. When a policy around the use of ultrasounds was requested, no such policy was provided, instead a draft policy in relation to the use of charitable funds was furnished. It is incumbent on any Appellant for charitable status to demonstrate that it meets the public benefit criterion to be a charitable organisation. For an organisation that has been in existence for as long as the Appellant, it would be expected that such a policy would already be in existence and form the basis of the provision of ultrasounds, and if not, when it was requested, for it to be readily provided in a finalised form, addressing the relevant points. This was not done.*

19. *On considering all the evidence, the Board is of the view that the public benefit criterion, on the balance of probabilities, has not been satisfied by the Appellant.*

20. *For the reasons outlined above, the Board is not satisfied that the Appellant is a charitable organisation within the meaning of the Act."*

43. The Appellant entered an appeal dated 31 October 2024 against the Decision of the Authority. In the Appeal, the Appellant submitted the following further additional information:

> "*1. The Appellant is satisfied it satisfies the* 'Public benefit' *test as per section 3 of the Charities Act. The Appellant has been providing its services for the past 12 years to the general public and hundreds of service users have benefited from its service . There is no fees for its services and no barriers put up in the way of members of the public who wish to avail of its service. The CRA makes the point that because the Appellant did not have written policy and procedures in place around the use of ultra sound it could not confer a public benefit on the balance of probabilities. In addition some degree of concern is expressed by the CRA that no such policy and procedure is in place despite the Appellant being in existence for 13 years . The provision of ultra sound scanning is only one small aspect of the work the Appellant is engaged in. In the past year approximately 14 service users availed of scans . The expenditure of the Appellants* (sic) *funds on this has a significnat* (sic) *public benefit . The Appellant position is that many services users have benefited greatly from getting a scan carried out. The absence of any formal policy and procedures document has in no way diminished the value of this aspect of the services they provide .This has been the tried and tested experience of the Appellant over 12 years of being in operation.*
>
> *2) The Appellant in the past provided scans and in more recent times has out sourced this service to other independent clinics based on availability and location of the service user. These scans are only one part of the service the Appellant provides , but they are a very important aspect in that many of the service users may never have been pregnant before and can be anxious, distressed and worried about their pregnancy in the Appellants* (sic) *experience they have found that it is of enormous assistance to a service user to be able to avail of a scan. It is very reassuring. Undue weight was attached to this aspect of their service by the CRA in reaching their determination. It is only one part of the suite of services they offer. For operational reasons the Appellants now out sourced this service. In the past they had professionally trained personnel who conducted the scans. The Appellants have now developed a policy documents around scanning which is enclosed. To reiterate* (sic) *the offer of scans as part of the Appellant* (sic) *services is highly beneficial and confers a significant public benefit.*

3) *The CRA in refusing the application has indicated that far from satisfying the public benefit test and conferring a benefit it is in fact harm that may be caused. No evidence of any harm has been provided by the CRA. The Appellant has an unblemished track record and has never been the subject of a complaint to the Gardai, TULSA, Department of Health or any other Regulatory body that it has engagement with. The Appellant have had referrals, from TULSA, HSE, and various medical clinics etc. The commissioning of an ultra sounds does not cause any harm of itself and in the Appellant experince* (sic) *it is fact the opposite. It is purely misguided speculation in the Appellant view that* 'harm' *could be caused. No factual basis has been provided to arrive at this position, no examples of potential harm have been provided. In 12 years of operating the Appellant has never had a case of* 'harm' *being caused by providing a scan.*

4) *This application was delayed by covid and in addition which is common case for not for profits the board of directors are non-executive volunteers and there were some changes in personnel also which collectively impacted on the progress of the application -but this cannot be a reason or factor in refsuing* (sic) *to grant charity registration.*

5) *The appplicant* (sic) *reserves the right to raise further points of appeal at the hearing of the appeal and expand further on the points outlined above. It is also relying on the testimonials attached from service users."*

44. Despite Mr. Ó Ceallaigh on behalf of the Appellant stating that it reserved the (asserted) "*right to raise further points of appeal at the hearing of the appeal and expand further on the points outlined above",* at no time did Mr. Ó Ceallaigh point to or identify the source of the asserted right "*right to raise further points of appeal at the hearing of the appeal",* nor did Mr. Ó Ceallaigh give notice of his intention to do so. In its subsequent Legal Submissions, without prior notice of his intention to do so, and without seeking the leave of the Tribunal to do so, Mr. Ó Ceallaigh on behalf of the Appellant sought to make allegations as to improper and unlawful motive against the Regulator. This will be referred to again later.

THE APPEAL HEARING BEFORE THE TRIBUNAL ON 12 MARCH 2025.

45. The following parties appeared at the hearing.

On behalf of Appellant, on 12 March 2025:

Mr. Cormac Ó Ceallaigh, Solicitor,
Ms. Elizabeth McDermott, Gianna Care CLG.
Mr. Michael Moore, Gianna Care CLG.
Ms. Carolyn O'Meara, Gianna Care CLG.
Ms. Catherine Scully O'Sullivan, Gianna Care CLG.

On behalf of Respondent 12 March 2025:

Mr. Alan Fitzgerald Charities Regulatory Authority
Mr. Brian Gageby, Barrister.

The following sat as members of the Tribunal.

Mr. Patrick O'Connor, (Solicitor), Chairperson,
Ms. Nuala Dockry Barrister,
Ms. Carol Fawsitt, (Retired Solicitor),
Ms. Karen Horgan (Charities Expert), and
Dr. Bill Holohan SC (Solicitor and Senior Counsel).

A PRELIMINARY APPLICATION ON THE PART OF THE APPELLNT

46. The initial appeal hearing took place at the offices of the Residential Tenancies Tribunal at O'Connell Bridge House, Dublin 2, on the 12 March 2025, at which point, without any prior notification to the Tribunal or the Authority of an intention to seek leave to do so, an application on behalf of the Appellant was made by Mr. Ó Ceallaigh by way of preliminary application to the Tribunal.

47. Mr. Ó Ceallaigh indicated that he had instructions to make a preliminary application seeking to have two members of the Tribunal recuse themselves. Mr. Ó Ceallaigh said that the Appellant was characterised in the press as "*a life affirming organisation*" and he said that they "*make no secret about that*". He said that their objective is to support women in crisis pregnancy and to assist everything that goes with that and the Appellant's preliminary application was in respect of two members of the Tribunal hearing this matter, namely Tribunal Members Dr Bill Holohan SC and Ms. Carol Fawsitt, in circumstances where there was a number of tweets that were made in the context of the Repeal of the Eight Amendment referendum in 2018 which Mr O'Ceallaigh said he felt amounted to objective bias and certainly prejudiced a fair and independent and impartial hearing of the appeal by those to Tribunal Members.

48. Mr. Ó Ceallaigh said that he would very briefly refer to certain Tweets which he said had been issued by Tribunal Member Mr. Holohan on the 25th of May 2018 and then make his application and open case law in support of that application. He quoted from a document which he identified as the Tweets, saying:

> "*These women in consequence of such girls and women which have been forced into that choice and who suffer serious consequence as a result of taking pills containing God knows what. The physical, psychological and mental consequence are enormous. People like Ronan Mullan are saying no, no*".

49. He then said that there was another one,

> *"… and thereby save the life of an unborn child. It might indeed do that in a handful of cases, but for many thousands of women who decide to proceed this harsh, cold, cruel punishment what you have done. It imposed a cruel mental trauma on women",*

then, continuing to quote from the document, he said it stated "*No*" and then a picture of an iron bridle, and then another post,

> *"Understanding of God, they deserve the compassion and understanding of the Irish people. The Irish people, if they are truly Christian should vote today in overwhelming numbers to say yes. They should say yes, we will show you love. Yes, we will show you compassion. Yes."*

and then another one,

"No matter what you have done this was smug, condescending and judgmental, judgmental in the extreme. It was hypocritical in the extreme. It displayed no understanding of their situation and why she made a difficult decision that she did make. It displays no love, it displays no compassion".

50. He said that there were just two more.

"*Healthcare for infants. Infants, toddlers and children. They are not seen campaigning for better education facilities for our children. They are not seen campaigning for measures to combat social inequality. They are not seen campaigning for measures to tackle the cause social*".

and then,

"*Loudest are the very people who aren't seen when issues of caring for those who do suffer from mental health problems arise. They are not seen when issues of social justice arise. They are not seen campaigning for better healthcare for women. They are not seen campaigning for free…"*

and then

"they are not seen campaigning for measures to assist vulnerable members of society. They are not seen campaigning to assist the agony of those who are homeless, pregnant or not. They are like Pharisees who like to be seen front row of the temple".

52. He said that he would then just refer very briefly, to Tribunal Member Ms. Carol Fawsitt who on the 25th of April 2023 tweeted:

"Abortion services in part of Ireland untenable report refines…"

He said she had linked an article from the Irish Times.

"Abortion service may collapse, says review researcher. There is a lack of consistent management of conscientious objection. Surely this is not in the spirit of the legislation and women are still being forced to leave their country."

He said that he would hand in the Tweets.

53. The Chairperson asked if he had multiple copies of the document so that copies could be given to all members of the Tribunal and to the legal representative of the Authority and Mr. Ó Ceallaigh said that he had just the one copy. He handed in a 16 page/16 section document which he identified as containing the tweets from Tribunal Member Mr. Holohan and another document containing what he said was the tweet from Tribunal Member Ms. Fawsitt.

54. Mr. Ó Ceallaigh said that there was absolutely no personal criticism whatsoever of Tribunal Members Mr Holohan or Ms. Fawsitt being expressed. He said that he would fully accept that Tribunal Members Mr Holohan and Ms. Fawsitt were individuals of the highest repute, but that they had taken a public stance which was entirely legitimate but this was known to his clients and there was now an issue of objective bias. He said that he had firm instructions from his client from which he would not demur and it would be apparent that these views would not be in harmony with those of his client whose charity would have a strong life-affirming ethos.

55. Mr. Ó Ceallaigh described the tweets as "*pretty emotive tweets*" and said that the rule against bias is designed to encourage impartiality in decision-making by removing presumed sources of impartiality. He said that where the rule applies, a person affected by a decision is entitled to have it decided by an adjudicator who is and appears to be unbiased and the Tribunal may be aware the position of objective bias is long-established, as far back as the famous Sellar v. Highland railway case in 1919,[2] a UK case, and that held a judge who has a pecuniary interest in a case, however small, should decline to sit. He then referred to what he described as a more recent case in the UK, Porter v. Magill[3] from 2001.

56. Mr. Ó Ceallaigh said that the question was whether the fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the Tribunal was biased, and he said that these tweets showed that those he referred to as "*these two individuals*" have taken a public

[2] Sellar v. Highland Railway Co. [1919] UKHL 216 (24 January 1919). A copy of the case report was not provided to the Tribunal.
[3] UK, Porter v. Magill [2001] UKHL 67. A copy of the case report was not provided to the Tribunal.

stand on the "*these issues*" and have made that stand "*in the public square*". Mr. Ó Ceallaigh did not elaborate on what he was referring to as "*these issues*".

57. Mr. Ó Ceallaigh said that he would also comment in relation to Article 6 of the European Convention on human rights:

> *"In determination of his civil rights and obligations or any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law",*

58. Mr. Ó Ceallaigh said that he wanted to open the main authority on which he intended to rely that being is the Supreme Court case of the Dublin Wellwoman Centre.[4]

59. Mr. Ó Ceallaigh said that the Supreme Court case of the Dublin Wellwoman Centre[5] was a case that the Tribunal may be familiar with, describing it as a very well-known case. He said that he would give just a brief summary of this case, saying that the Tribunal Members may be familiar with the case.

60. Mr. Ó Ceallaigh then said that this was a case where Ms Justice Mella Carroll in her capacity as judge of the High Court had delivered judgement in the High Court.

61. The Chairperson requested the date and citation of the case. Mr. Ó Ceallaigh said that the Supreme Court judgement had been delivered on 21 December 1994, and he said that this case where Mella Carroll whom he said was a High Court judge, was a chairperson of the Council for the Status of Women and in the context of a then upcoming referendum, she wrote to the Taoiseach of the day with some concerns about the right to travel and the right to information relating to abortion. She was subsequently asked to recuse herself from dealing with the High Court case on the basis that she would not be impartial and she took the view that she could be impartial, and she refused and the case was ultimately taken to the Supreme Court and there were two points, but the point Mr. Ó Ceallaigh intended to focus on was the question of bias and what did the Court say in relation to that.

[4] Dublin Wellwoman Centre and others v. Ireland and the Attorney General, [1995] 1 I.L.R.M. 408.
[5] Dublin Wellwoman Centre and others v. Ireland and the Attorney General, [1995] 1 I.L.R.M. 408.

62. The Chairperson asked Mr. Ó Ceallaigh to identify the relevant page of the judgement and he confirmed that it was page 23.

63. Mr. Ó Ceallaigh said that just in the general sense, "*bias*" is an emotive word. It is defined in the Oxford English Dictionary as:

> "*An inclination, leaning, tendency, bent or preponderance, disposition or propensity, predisposition, predilection or prejudice*."

Mr. Ó Ceallaigh said that it is also a technical legal term and as such has been defined by the courts in many, by the courts in many cases.

> *"The concept of bias developed through cases considering material interest. It also arose in cases of prejudgment, prior involvement and personal attitudes and beliefs. There are two fundamental streams of thought within this wider concept. Firstly, there should be no actual bias, i.e., subjective test, and secondly, that there should be no reasonable apprehension that there is bias, i.e., the objective test. Both of these streams of thought are equally important in the broad river of justice."*

64. Mr. Ó Ceallaigh said that he would then want to turn over that page and just to reference from 6 lines down. He started to read a portion of the paragraph, and the Chairperson asked him to read it all. Mr. Ó Ceallaigh then proceeded to read the paragraph in full and then moved to the second paragraph of page 25 and read that paragraph. The Chairperson asked him to read the paragraph as printed in the judgement, asking him to be careful in quoting the judgement, and asking him to read it as it appeared in the judgement. Mr. Ó Ceallaigh then proceeded to read the paragraph in relation to the appropriate test. He then quoted:

> *"The appropriate test was recently applied by this court in O'Reilly v. Honourable Judge John Cassidy and others where Finley CJ at page 6 of his judgment stated:*
>
> > 'The second matter in which I am satisfied an arguable ground has been established is that the daughter of a learned Circuit Court Judge who was sitting to try the case appeared on behalf of the State and on behalf of the Garda objection.'

An objection to that fact was taken on behalf of the Appellant and that is fundamental in my view. If no objection is taken to any relationship between the advocate and the judge, there could be no conceivable impropriety in the judge continuing to hear the case. There is no suggestion being made in this case and I have seen a transcript of the hearing as one of the documents, of any bias being displayed by the judge at all of any description. Nor does Mr McCullagh make the suggestion of bias. The suggestion he makes is that the test to be applied was would a reasonable person apprehend that there might be bias because of that relationship."

65. The Chairperson asked Mr. Ó Ceallaigh to finish reading the paragraph. Mr. Ó Ceallaigh continued:

"The Appellant's very considerable stake involved in the decision in the case having instructed her counsel to object to the relationship. I am satisfied that the court possibly should have discontinued the matter and either got another judge to do it or to take some step. I am not saying that must be done. I am not saying that should be done, but I think this is an arguable ground and it is appropriate that it should be included in the grounds of which judicial review should be commenced."

66. Mr. Ó Ceallaigh said that he had just two or three more references. He continued:

"In the above ex tempore judgment Finlay CJ was applying a similar test to that which previously, he had previously expanded in O'Neill v. Beaumont Hospital Board [1990] ILRM 419, where he stated page 438,

'The bias alleged in this case is a bias consistent of pre-judgment. The plaintiff's case in very brief summary is that a consideration of the question of the making of the decision as the continuance or determination of his services as a consultant in the hospital cannot fairly be carried out by reason of the fact that the persons who should carry it out have pre-judged his case. There is no suggestion of personal animosity, personal gain, or personal self interest in any member of the board as a form of bias. The sole form of bias alleged is pre-judgment.'"

67. Mr. Ó Ceallaigh said he was continuing page 28.

"I am satisfied that proper standard to be applied by this court which does not appear to be wholly different, though it may be subtly different from the standard which was applied in the High Court, is to question as to whether a person in the position of the plaintiff, Mr O'Neill in this case who is a reasonable man should apprehend that his chance of a fair and independent hearing of the question as to whether his services should be continued or terminated does not exist by reason of the pre-judgment of the issue which are involved in that by the members of the board. That in my view is the proper test to be applied in this case and it fulfils what I understand from the authorities to be the test which has been accepted in this country and by the court in relation to a case of this description."

68. Mr. Ó Ceallaigh said that he would continue just briefly:

"That standard is applicable to this case. In the High Court there is no suggestion of personal favour or personal interest, i.e. subjective bias of the learned High Court judge. The actual state of mind of the judge was and is not an issue. What was, is in issue is the objective test as to whether a person in the position of the appellant, in this case being a reasonable person should apprehend that his chance of a fair and independent hearing of the question at issue does not exist by reason of the previous non-judicial position statements and actions of the learned High Court judge on issues which are at the kernel of this case."

69. Mr. Ó Ceallaigh said that he would then turn over the page, but that before he would turn over the page just the last paragraph of page 29, he would read the middle paragraph of 29 because it runs into it.

"The facts set out fully here in the fore in this judgment indicate a situation where the learned High Court judge in her capacity as chairwoman of the status of women has voiced a view on the constitutional article in question. Obviously, this was not in her capacity as a judge, nor was it a legal decision. However, the letter to the Taoiseach a statement and the report the issues referred to, albeit superficially and with brevity. This concept somewhat different, differently phrased is fundamentally that stated 1968 by Lord Denning MR in Metropolitan Properties FGC Limited v. Lannon 1 QB [1969] 577 at page 599.

> 'In considering whether there was a real likelihood of bias, the Court does not look at the mind of the Justice himself or the mind of the Chairman of the Tribunal or whoever it may be who sits in a judicial capacity. It does not look to see if there was real likelihood that

he would or did, in fact, favour one side at the expense of the other. The Court looks at the impression which will be given to other people even if he was as impartial as he could be. Nevertheless, if right-minded people would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit and if he does sit his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise of conjecture is not enough; there must be circumstances from which a reasonable man would think it is likely or probable that the Justice or Chairman as the case may be would or did favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly, suffice it that reasonable people might think he did. The reason is plain enough; justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking the judge was biased.'"

70. Mr. Ó Ceallaigh said that he would then refer to the second last page under the heading, page 56. The Chairperson asked him to read page 32 first. Mr. Ó Ceallaigh said he was reading the middle of page 35, but the Chairperson asked him to read page 32. Mr. Ó Ceallaigh proceeded to do so:

> *"It has long been a practice of the judiciary in this State not to act as a judge in a case where they have an interest or where there are grounds on which a reasonable person might fear in respect of issues involved, he could not get an independent hearing. This is a convention which the learned High Court judge has herself practiced in not unrelated circumstances previously. That perception of the administration of justice. The concept that the perception of the administration of justice as well as the content of justice is as importance today as in years gone by. The statement of Lord Hewart CJ is as relevant today as when it was made in 1923. With the development of the modern communications media and an increasingly educated, inquiring society, the public perception of the impartiality of the courts is a cornerstone of the administration of justice in our constitutional democracy."*

71. Mr. Ó Ceallaigh asked if the Chairperson wished him to read on. He said that there was just one last paragraph at the very end of it to which he wished to refer. He said that he was not sure how much the Chairperson wanted him to read. The Chairperson responded that it was part of the judgment and asked him to please read it. Mr. Ó Ceallaigh continued:

"Before the High Court the issue will be the interpretation of the 14th amendment to the Constitution. The appellants are putting forward a meaning that is apparently different to that maintained..." --

72. The Chairperson asked Mr. Ó Ceallaigh to clarify from what page he was reading and Mr. Ó Ceallaigh said that he was reading from the top of page 33. He continued:

"Apparently different to that maintained by the plaintiffs. It may be that the only contradictor to the plaintiff's action will be the appellant. The view of the plaintiffs may be consistent with the second statement to government of the commission on the status of women which stated:

'The Commission wishes to make the point that an amendment confined to the right to travel is too limited. Any amendment to the protocol would also provide for freedom for counselling and freedom of information because of past Supreme Court decisions. The Supreme Court has decided and spoke via Open Door Counselling and other [1988] IR 593, that non-directive counselling to pregnant women is forbidden by article 40.3.3 of the constitution. It has been submitted to the Commission and the Commission accepts that following that judgment, the lack of counselling even from a GP and the difficulty in getting information has resulted in women going to England for termination without any counselling. Many of these women are at an advanced stage of the pregnancy. If they had access to counselling, it might have enabled them to decide to complete the pregnancy. If they had decided to consider the possibility of termination further, at least they would have had the opportunity to reflect at an early stage of the pregnancy on the other options open to them', end quote. The majority report of the commission recommended, '*any amendments to the Maastricht Protocol should provide not only for freedom of travel, but also freedom to he was reading and give and receive counselling and for freedom of information*'. Of the amendment to Article 40.3.3 of the Constitution in 1992, learned High Court judge said, *'In a reserved judgment therein, the Commission in its final report said that the result achieved what the commission had recommended in one of its alternatives and the only recommendations made by the commission was that the Oireachtas should pass legislation as recommended in chapter 11, paragraph 11.6.1 so the Commission accepted the constitutional position as it was when it presented its final report and made no recommendations about any further amendments. The Commission cannot therefore be labelled as not supporting the constitutional position*'.

> The appellants now come to court seeking an interpretation of article 40.3.3 and the provision of information therein referred. Abortion, the nature of the matter for consideration in this case is of particular importance and relevance. The issue of abortion and the related amendments regarding travel and information are perhaps the most emotive and decisive topics in our community today. The courts have to be ever vigilant to protect the constitutional rights, constitutional interpretations and justice and to be seen to do so."

73. Mr. Ó Ceallaigh said that he would then refer to page 36.

> *"It is a fundamental and old age concept in common law that justice must manifestly and visibly be seen to be done. It is expressed now as constitutional justice. In cases such as this where many reasonable people in our community hold strong opinions, it is of particular importance that neither party should have any reasonable reason to apprehend bias in the courts of justice. Further, once the question of a possible perception of bias has been raised reasonably on the grounds of pre-existing, non-judicial position and actions, it would be contrary to constitutional justice to proceed with a trial. Then I am satisfied that the learned High Court judge should have discharged herself. There is no question of a personal interest of the learned High Court judge, no subjective bias. However, applying the test set out and the conclusions reached herein, the appellant has made out the case of a reasonably apprehended bias in the circumstances, objective bias. Consequently, I would allow the appeal."*

74. Mr. Ó Ceallaigh said that he would then say, in circumstances where the reasonable person, if they were made aware that the Tribunal consisting of five members and they had no idea what their views were, they would have great confidence in the ability of the Tribunal to give a fair, independent and impartial hearing. However, in circumstances where there were two of the individuals who had each made a public statement and taken a very public position, which they are perfectly entitled to do and he would make no criticism of that whatsoever, where two of the members of the Tribunal have taken a public position on this matter and made comments which would be at odds and inconsistent with the ethos and the spirit of what his clients stand for, he thought that his clients would have very strong reasons to take a view that the two Tribunal Members would have difficulties being impartial in their deliberations on the issues

leading to a registration of a charity. Mr. Ó Ceallaigh did not clarify at this point, the nature of the "matter" being referred to by him.

75. The Chairperson thanked Mr. Ó Ceallaigh but said that just to recap, to be absolutely clear, the Chairperson would ask Mr. Ó Ceallaigh if he was suggesting that two members of the Tribunal recuse themselves from the hearing. Mr. Ó Ceallaigh replied in the affirmative indicating that looking at the Act, his understanding and his view was that the Tribunal would have to be reconstituted for the Appellant's appeal to be heard if his application was to be successful.

76. The Chairperson said that he would come to that but wanted to confirm that the basis of the application was that there is no suggestion of subjective bias but that it was is objective bias. Mr. Ó Ceallaigh replied in the affirmative. The Chairperson asked Mr. Ó Ceallaigh to confirm if Mr. Ó Ceallaigh was suggesting that this was because two members of the Tribunal had expressed certain views in public. Mr. Ó Ceallaigh replied in the affirmative. The Chairperson asked Mr. Ó Ceallaigh if this was in relation to the personal views of the two Tribunal members and Mr. Ó Ceallaigh replied in the affirmative. Mr. Ó Ceallaigh said that that was the perception, that there would be bias against his client. The Chairperson said that he just wanted to be absolutely clear about the issue.

77. Mr. Gageby said that he did not wish to interrupt but he would wish to make submissions.

78. The Chairperson said that he was very surprised that this application should be made at this late stage. He said that he would have thought that if there was to be such an application, that it would have been referenced and notified to the Tribunal in advance that there was a preliminary matter that perhaps should be considered by the Tribunal and then, it should have been set out in writing in advance. The Chairperson said that that was not to say that the members of the Tribunal had made any decision in relation to it because of course the members of the Tribunal would have to deliberate in relation to it. The Chairperson said that there was the second matter and Mr. Ó Ceallaigh had alluded to it, that if he was not saying that they have, but if the two Tribunal Members were to recuse themselves, the position would then be that the Tribunal cannot proceed under the provisions of the legislation that is in existence at present and there was no guarantee as to when a Tribunal could be established to deal with this. He said that it could be months, or it could be years. So that is a consequence if the Tribunal Members were to decide to recuse themselves from the Tribunal. The Chairperson said that he would set this out so that Mr. Ó Ceallaigh and his client were aware of that. Mr. Ó Ceallaigh acknowledged that.

79. The Chairperson then invited Mr. Gageby to speak. He said that it was not his role and was not his clients' role to defend or intervene on behalf of the Tribunal. He said that he would just say though that it was also a bit surprising from his perspective that he was not given notice of the application, and that he had not been provided with any of the authorities being relied upon by Mr Ó Ceallaigh. He said that this modus operandi was not something that he would expect in practice, so he was slightly trying to deal with this application "*on the cuff*" as he described it and that it was an issue, which he said was a complicated issue and he would just make that comment at the start. Mr. Gageby said that it seemed to him that the issue, in terms of any discussion on objective bias, was whether or not the test set out by Orange Telecom, the leading Supreme Court case, had been met by the Appellant.

80. Mr. Gageby said that the onus was on the Appellant to establish objective bias and that he would go through the test as best he could but that he would make it as a preliminary observation about this case. He said that it was a remarkable feature of the papers that there was little if any reference whatever to abortion in any of the papers. He said that he thought he could find one reference in the whole of the pages before the Tribunal in relation to the question of abortion, which he thought arose in the 2020 submissions on behalf of the Appellant and what he thought was important to consider is that this case was not actually about whether one has a pro-abortion stance or a pro-life stance and certainly the Regulator took no role whatever in respect to that.

81. Mr. Gageby continued saying that there are charities who have a pro-life ethos who are registered charities in this jurisdiction and it was irrelevant to any consideration by the Regulator, and he would submit also before the Tribunal, i.e. what ethos is irrelevant, because what the Tribunal was considering is a narrow, net issue, which is whether or not the statutory test had been met and whether or not this Appellant satisfied the statutory test for a charitable purpose and charitable function was met. So, he would make that observation at the outset, that this is not a question of the Tribunal determining whether a particular ethos ought to be caught by the legislation.

82. Mr. Gageby said that in his notes he had a note in relation to a decision which is under appeal. He said that it was clear that that aspect of the case plays no part whatever in it, because when you look at the decision in detail, the decision is a very net one by the Regulator. He said that it was not saying that these people did not meet the definition on their face, it was not saying that the objects clause set out in the Constitution did not meet the definition. What they were saying is because of certain concerns surrounding policies and procedures relating to scanning and the referral for scanning, that the Regulator had a particular concern and therefore had not granted registration. So, in terms of any discussions

about objective bias, he would like to put into context, one, what the case is and is not about and it was not about abortion, it was not about whether one was pro-life or pro-abortion. He said that it had nothing to do with that. He said that there was about a very net issue that had arisen in making a decision. A registration has been refused because of particular concerns the Regulator had. Whether the Regulator was right or not was obviously ultimately a matter for the Tribunal. He asked if the Tribunal could bear with him in terms of the case law because he was dealing with this somewhat on the cuff.

83. Tribunal member Ms Dockery asked Mr. Gageby to repeat the one case he had referenced already because she did not catch it. He said that it was the case of Orange Telecom, describing it as the leading case from the Supreme Court on the issue of bias. He said that he was going to open the relevant passage. Tribunal Member Ms Dockery thanked him and acknowledged that he was dealing with Mr Ó Ceallaigh's application "*on the cuff*". Mr. Gageby said that he was just working from his notes in relation to a different matter.

84. Mr. Gageby said that first of all, the party who argues that an adjudicator should be recused bears the onus of establishing objective bias (as distinct from subjective bias) and that is established by a case called Commissioner of An Garda Síochána v Enfield Enterprises [2016] Court of Appeal 141 and then the test to be satisfied in that regard was set out by Ms Justice Denham in Bula Limited v. Tara Mines[6] where she provided as follows:

> *"It is well established that the test to be applied is objective. It is whether a reasonable person in the circumstances would have a reasonable apprehension that the Appellants would not have a fair hearing from an impartial judge on the issues. The test is not about the apprehension of a judge or judges, nor does it invoke the apprehension of any party. It is an objective test, it invokes the apprehension of a reasonable person."*

85. He said that the case law goes on then to consider the question of what a reasonable person for the purposes of that test and in a case that is called Kenny v Trinity College,[7] Mr Justice Fennelly stated that this person is an independent observer who is not over sensitive and who has knowledge of the facts. He said that one would know both of those which ended in favour of it against the possible apprehension of a risk of bias. He said that what the case law makes clear is that a reasonable person must have knowledge not just of the facts and the statements made which are alleged to be biased, but also the

[6] Bula Ltd v Tara Mines Ltd (No 6) [2000] IESC 15; [2000] 4 IR 412.
[7] Kenny v Trinity College [2007] IESC 42.

case which is before the Tribunal and they must understand, the reasonable person must understand, the nature of the case that is before the Tribunal. He said that he would emphasise that from the Regulator's perspective, this was never a case about what ethos this particular Appellant had. He said that this was not something which is relevant to the application because it was a narrow application in terms of the charitable test. So, because of the nature of the decision before the Tribunal, he would suggest that the test was not met.

86. Mr. Gageby said that the other issue that does arise and he wanted to be very careful about this because he had not had the opportunity to do his own research in advance in respect of it to make sure what he was now telling the Tribunal is correct. He said that he wanted to be careful, but he was aware that there is a principle of necessity where an allegation of objective bias is made and in circumstances where there is a Tribunal which has been appointed, which is subject to statute, which is a panel of five members which cannot be readily replaced, there is a doctrine of necessity, but he would suggest some caution in respect of that just from his brief researches. He said that one of the Tribunal cases, O'Callaghan V Mahon,[8] the Supreme Court considered that test as being a fairly limited one and they just said as follows in respect of it. He said that it is reflected in a case called O'Neill v. Beaumont Hospital[9] where Chief Justice Finlay said it is not a dominant doctrine, it could never defeat a real fear and a real reasonable fear of bias or injustice. But, he said, it is a consideration in relation to the question of the entire board being prohibited. And so, he said he would just caution the Tribunal that from a very preliminary view, it is something that the Tribunal might consider, but it was not something which necessarily would be a complete answer if there was a good complaint of objective bias. So, he would really stand on his first submission which is an analysis of whether or not the objective observer would really say that there was an objective bias in this case considering the decision which the Tribunal would have to make, which he would say is the legislation (as distinct from the ethos of the Appellant).

87. The Chairperson then invited members of the Tribunal to speak. Tribunal Member Mr. Holohan then stated that he wanted to assure Mr. Ó Ceallaigh and his client that he was not engaged emotionally with the application challenging his position as a member of the Tribunal, but he was intellectually engaged with it. He said that he would infer from what Mr. Ó Ceallaigh had said that the Appellant/appellant was a pro-life organisation and in response Mr. Ó Ceallaigh said that it was a life-affirming organisation. Mr Holohan said that he had not identified or taken that from the documentation that Tribunal members had received that the ethos of the Appellant was an issue, and that there was nothing in the papers to that

[8] O'Callaghan & Ors v Judge Alan Mahon & Ors, [2007] IESC 17.
[9] O'Neill v Beaumont Hospital Board [1990] ILRM 419.

effect and it did not appear to be an issue in relation to the grounds of the appeal. Mr Holohan said that he could say that the issue of abortion had not crossed his mind, nor did he think it crossed the minds of the other members of the Tribunal, but he appreciated the point that Mr. Ó Ceallaigh was making in relation to it. He said that he would refrain from further comment for the moment. He said that he anticipated that the Tribunal would need to rise to consider the nature of the application.

88. Tribunal member Ms. Fawsitt said that she too would have thought it was very tardy to raise on the day of hearing, and it was something that could have been flagged in advance both to the Regulator and to the Tribunal. So, she would agree and reiterate that and that that was all that she would have to say.

89. The Chairperson said that was obvious that it would have been preferable and appropriate if Mr. Ó Ceallaigh had notified this issue to the Tribunal in advance and if he had put in a formal submission with reference to the authorities to which he had referred, rather than asking the Tribunal to try and deal with it off the cuff, and without providing copies of the documents on which she would rely and the case authorities on which he would rely for the purposes of his application. Mr. Ó Ceallaigh acknowledged the comment.

90. The Chairperson said that it was very, very difficult to deal with unanticipated applications but that did not mean that the Tribunal would not deal with it, but just it was difficult and in fairness to Mr. Gageby and to the Regulator as well to deal with that in the absence of advance warning. The Chairperson said that the other thing he was going to mention in case it arises, as Tribunal Member Mr. Holohan had referred to it, he did not take out of any of the papers that he had seen for the purposes of the Appeal that there was any involvement of the question of either affirmative life, pro-life or otherwise ethos of the Appellant i.e. in relation to Mr Ó Ceallaigh's client. The Chairperson said that that certainly did not jump out at him on review of the papers as being a relevant issue. The Chairperson said that he had thought, and he took from what they were, on the actual papers before the Tribunal, that the Appellant was providing the counselling and the other services provided, but that was not an issue under appeal.

91. Mr. Ó Ceallaigh said that he did want to apologise. He said that it absolutely was not his intention to take anybody short in relation to this. He said that the first he had found out about this was "*literally*" in the previous couple of days. He said that he had only got details of the names of who are on the Tribunal panel a couple of days previously. The Chairperson commented that membership of the Tribunal was a matter of public record, and it could have easily been found out that for the last five years the current

members of the Tribunal were in place as that information was in the public domain. Mr. Ó Ceallaigh said that they were only notified of the membership of the Tribunal a few days previously.

92. Mr. Ó Ceallaigh said that he did contact the Tribunal Secretariat and asked them would it be necessary to put submissions in, in advance of moving his application. He said that the Secretariat said no, sometimes, the answer that was given was that sometimes the Tribunal might ask for submissions. He said that he took it that after the hearing the Tribunal might ask for submissions to be put in before the Tribunal would reach a decision and then he said that he did reserve in his Notice Of Appeal, the option to include other material. So, he said, there was no suggestion here that he was trying to take anybody short or anything like that. He said that he had acted on his instructions and he felt that the points are very important, and while his client certainly was not pro-life in their name, their whole ethos was to support women in crisis pregnancy and support life and his concern was, to go back to what he had said earlier, is the tweets of the two Tribunal Members, Ms. Fawsitt and Mr Holohan. He said it was clear from their posts that their position would be at odds with what his client was involved in, which is helping people, and would discourage people who came – who would come for counselling to put it quite bluntly, if people – women in a crisis pregnancy came to his client, Gianna Care, asking about abortion services, his client would not be willing to assist them in that regard. They would try and help in any other way, but that would not be their modus operandi or part of their objectives or their function, i.e. they would not be encouraging or supporting women who wanted to have abortions. So, he said, it was "*clear lines, that demarcation there*" and that it was "*in the mix of what they do*", the views of Tribunal Members Ms. Fawsitt and Mr Holohan "*would cause them concerns*" in terms of how the two Tribunal Members could be impartial in their role on this Tribunal, whatever about their personal outlook on it.

93. The Chairperson thanked Mr. Ó Ceallaigh saying that he thought it was important that Mr. Ó Ceallaigh explain to his client if he had not already done so, and that he, the Chairperson, did suspect Mr. Ó Ceallaigh probably had, as their legal advisor, that the Tribunal Members had not considered the ethos or otherwise of the Appellant (as it was not a relevant matter in the appeal), but were to be concerned with the pure legal aspect of whether or not the Appellant satisfied the statutory requirement to be registered as a charity. Mr. Ó Ceallaigh acknowledged this. The Chairperson said that the Tribunal did not go into the merits or otherwise of what the Appellant does or otherwise and that it was simply confined to making a decision in relation to whether it satisfies the requirements of section 3 of the Act. That, the Chairperson said, was point number one.

94. The Chairperson then said that in relation to the actual operations of Mr Ó Ceallaigh's client, the Tribunal cannot and would not make any reference, good, bad or indifferent in relation to it. The Chairperson said that the Appellant was in existence since 2011 and presumably would continue in existence whether or not it achieved charitable status. Its application to the Regulator and its appeal to the Tribunal was to seek to get charitable status. That does not in any way impinge with what it is doing, although the Chairperson said that he did notice in the document, or one of the documents that was produced, which is the business plan for December 2020, that the aims and objectives of the Appellant states that it operates "*in the charity sector*" and provides counselling services. The Chairperson asked Mr. Ó Ceallaigh if his client was aware that until such time as it has charity status it should not have that description. Mr. Ó Ceallaigh responded in the affirmative.

95. The Chairperson indicated that the Tribunal was going to rise, and the Tribunal members were going to consider the application which he had summarised already, which is a net point that two of the Tribunal Members should recuse themselves on the basis of perception of objective bias in relation to the Appellant's Appeal. He asked Mr. Ó Ceallaigh if that was correct. Mr. Ó Ceallaigh said that that was "*very fairly put*".

96. The Tribunal then rose and adjourned to consider the matter.

97. The hearing before the Tribunal resumed, and the Chairperson indicated that the Tribunal was convened to deal with an appeal by the Appellant Gianna Care CLG against the decision of the Regulator not to recognise it as a charity under the Charities Act 2009. A preliminary objection was made in relation to the composition of the Tribunal by the Appellant and the Tribunal heard submissions from Mr. Ó Ceallaigh and also from Mr. Gageby who represents the Regulator. He said that it was a very interesting question and also very interesting debate and a very interesting point. He said that it would have been preferrable if advance notice of this application had been given to the Tribunal in advance because ultimately the only party who was going to be inconvenienced by any decision that the Tribunal might make will of course be the Appellant because they will not have charitable status until such time as a decision is taken only on the substantive appeal by the Tribunal itself. The Chairperson said that he did make reference to some of the material in which they refer to themselves as a charity. That, he said, was neither here nor there. He said that it was not for the Tribunal that day, but it was something that might be taken into account.

98. So, having heard what he referred to as "*the very learned submissions made*" the Tribunal had decided that because of the importance of it and the novelty of it, to this Tribunal at least, while there is a considerable body of jurisprudence, some of which the Tribunal members were quite well aware, which was opened by Mr. Ó Ceallaigh and others referred to by Mr. Gageby , the Tribunal Members thought it was important that the Tribunal deal with this matter as one would expect, in a purely forensic and legal basis, taking into account the legal principles involved. The Tribunal directed the Appellant to furnish to it written submissions in relation to the application made, setting out the reasons that the Appellant might wish to include and also to ensure in those submissions that they make reference to the Tweets or messages that they referred to but in doing so that all of the actual messages, both the commencement of them and the threads relating to them and any subsequent threads, are actually produced. The Chairperson said that taking something out of context can give a particular angle or a particular view in relation to the matters and they are the Tweets and the messages that Mr. Ó Ceallaigh referred to that were made by Tribunal Members Mr Holohan and by Ms. Fawsitt. He said that the Tribunal must insist that it will be all of the actual context and the full thread of those actual messages which should be produced to us.

99. Secondly, in making the submissions the Tribunal wished to have the booklet of authorities in the usual format that is presented to a Tribunal or to the courts presented to the Tribunal. He said that the Tribunal were directing and were taking into account that it would take some time but were directing that those submissions be made to the Tribunal on or before Friday, the 9th of May and that a copy of those submissions be made also to the Regulator. The Regulator then may wish to make submissions in relation to the issues that have arisen and any such submissions – and again make reference to anything that is relied on and also make reference to any authorities, that will include a booklet of authorities in relation to that – that those submissions be made to the Tribunal with a copy to Mr. Ó Ceallaigh , as the Appellant's legal team, on or before Friday, the 30th of May. Considering that there is a potential difficulty in relation to one position that the Tribunal might take, the Tribunal had decided that it is important that the Tribunal get those submissions and that the Tribunal Members have time to deliberate on them.

100. The Chairperson indicated that the Tribunal would adjourn the Tribunal hearing to deal with the preliminary issue in relation to the application to recuse – that two of the members of the Tribunal recuse themselves and it would only be to deal with that matter – to Wednesday, the 9th of July at 11.00 am. He said that the hearing would probably take place in the same building, but the Tribunal could not be

certain of that until the Secretariat would get confirmation from the providers of the service, but the Tribunal would hope that it would be in the same location. So, the hearing would therefore be adjourned to Wednesday, the 9th of July and the Tribunal deal solely with that application which Mr. Ó Ceallaigh had made on behalf of the Appellant. Thereafter, whatever decisions are necessary will be taken.

101. Mr. Ó Ceallaigh thanked the Tribunal but indicated that he had a practical difficulty in that he was going to be out of the country on the 9th of July, and he wondered it were possible to put the matter in for some other date. The Chairperson indicated that that was not possible, as there were five members of the Tribunal and the Members had canvassed various dates. The Chairperson said that in terms of trying to identify the date on which all five Tribunal members will be available, it was very, very, very difficult. The Chairperson said that of course the Tribunal would like to accommodate Mr. Ó Ceallaigh as a legal colleague and as one of the legal representatives but unfortunately there were a lot of people involved, including five members of the Tribunal, the Regulator and everything else. Mr. Ó Ceallaigh said that he did appreciate that and that he would work something out.

102. The Chairperson said that he transcript of the hearing would be available in a few weeks.

103. Mr. Gageby asked if he could raise two issues. The first was to confirm that the date of 9th of July just for the hearing of the recusal application and the Chairperson confirmed that that was correct. Secondly, he asked that it be noted in the context of what might be said in future Submissions that the matter had been and was dealt with on the hoof and without the benefit of consideration and that he would be grateful if that could be noted. The Chairperson said that he did appreciate that and the same applied to Mr. Ó Ceallaigh and that was why the Tribunal thought it important because of the issues involved that there are written submissions that provide structure and also give an opportunity for all to add or otherwise to move it forward.

104. By letters dated 14 March 2025 from the Tribunal Secretariat to Mr. Ó Ceallaigh and to the Regulator, the Secretariat confirmed that:

> *"the Tribunal has directed the appellant, Gianna Care CLG, to prepare and furnish written submissions to the Tribunal outlining the grounds on which they are requesting the recusal of two named members of the Tribunal from the hearing of the appeal.*

The written submissions should include a Booklet of Authorities containing the supporting case law, along with a copy of the complete thread of the of the social media posts referred to by you at the hearing. The written submissions must be received by the Tribunal on or before Friday 9th May 2025, and a copy furnished to the respondent, the Charities Regulator.

The Tribunal further directed that the Charities Regulator make written submissions to the Tribunal, on or before Friday 30th May 2025, a copy of which is to be supplied to you as the representative for the Appellant.

The matter will be listed for decision and ruling on the preliminary issue only, as raised by you on Wednesday 9th July 2025 at 11:00am at the offices of the Residential Tenancies Board, O'Connell Bridge House, D'Olier Street, Dublin 2, D02 RR99."

105. Despite the clear communication of the direction of the Tribunal that the written submissions from the Appellant were to be received on or before 9 May 2025, no such submissions were received on or before 9 May 2025.

106. Without any prior communication from Mr Cormac Ó Ceallaigh indicating that there would be any reason for any difficulty in complying with the deadline of 9 May 2025, or any potential delay in complying with the deadline of 9 May 2025, and without Mr. Ó Ceallaigh making any application seeking the extension of time beyond 9 May 2025, within which the Submissions could be delivered, under cover of a letter dated 13 May 2025 to the Tribunal Secretariat, the solicitor for the Appellant, Mr Cormac Ó Ceallaigh enclosed "*Submissions together with Twitter screenshots*".

107. Mr. Ó Ceallaigh also stated, without further explanation, that:

> "*having considered the matter further we are not taking issue with Carol Fawsitt continuing on the board*".

108. On receipt of the correspondence from Mr Ó Ceallaigh, it was noted by the Tribunal Members that, despite the Chairperson, at the hearing in March, having directed that the Submissions should be accompanied by the *full* thread of the May 2018 tweet by Tribunal Member Bill Holohan, together with any comments or responses in relation thereto, which direction in turn was confirmed in writing by the

letter of 14 March 2025 from the Tribunal Secretariat to Mr Ó Ceallaigh, the "*Twitter screenshots*" so described, accompanying the 13 May 2025 letter from Mr. Ó Ceallaigh which forwarded the Submissions, in fact consisted of only 16 pages, whereas the full tweet in fact consisted of 24 pages. No reference to this discrepancy / omission / failure to comply with the Tribunal's direction was offered by way of explanation in the 13 May 2025 correspondence from Mr. Ó Ceallaigh nor was any explanation offered in relation to the failure to comply with the direction given by the Chairperson, and subsequently on the resumed hearing on the 9 July, the failure to comply with the Tribunal Direction was not referenced by Mr Ó Ceallaigh.

109. The Submission from the Appellant stated as follows:

> *GIANNA CARE AND THE CHARITIES APPEAL TRIBUNAL*
>
> *SUBMISSIONS*
>
> *Objective Bias*
>
> *There is well settled law as to the test to be applied by a court when considering the issue of objective bias.*
>
> *Reasonable person test*
>
> *In Bula Ltd v. Tara Mines Ltd (No. 6) [2000] 4 I.R. 412 at p. 441 Denham J. stated:*
>
> > 'It is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the Appellants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test — it invokes the apprehension of the reasonable person'. (my highlighting).
>
> *In Kenny v. Trinity College Dublin [2008] 2 I.R. 40 at P. 45, Fennelly J. stated that the test had been described authoritatively in Bula, in the words quoted above.*
>
> *In Orange Limited v. Director of Telecoms (No. 2) [2000] 4 I.R. 159, Keane C.J. at p. 186 stated:*
>
> > 'While the test for determining whether a decision must be set aside on the grounds of

> objective bias has been stated in different ways from time to time by the courts in the United Kingdom, there is, in light of the two authorities to which I have referred, Dublin Wellwoman Centre Limited v. Ireland [1995] 1 I.L.R.M. 408 and Radio One Limerick Ltd v. I.R.T.C. [1997] 2 I.R. 291] no room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias.'

Keane C.J. stated also at p. 185:—

> 'In such cases, the courts proceed on the assumption that, where there is a reasonable apprehension of bias, the decision must be set aside, although there is not the slightest indication that the decision maker was in fact actuated by any bias.'

In O'Ceallaigh v. An Bord Altranais [2011] IESC 50, the appellant alleged objective bias. In describing the relevant principles, Fennelly J. held:—

'34. The principles to be applied by our courts in adjudicating on allegations of objective bias have been well-established for a number of years and, in particular, by two decisions of this Court delivered within two months of each other in the year 2000. There is an inevitable tendency on the part of counsel to suggest that each new decision on a particular or novel set of facts constitutes a development in the law.

There are many individual instances of decisions on particular facts. Here, it seems to me that our courts have merely been concerned to apply very well known criteria.

Fennelly J. continued that he believed:—

> "... that the law is comprehensively and authoritatively stated in the judgment of Denham J, delivered in July 2000, in Bula v Tara (no.6). Having reviewed the law, and having considered, in particular, the decision of the House of Lords in Reg. v Gough [1993] A.C. 646, she rejected the suggestion that our courts should adopt a test based on "a real danger of bias." She cited the decision of the High Court of Australia in Webb v The Queen (1993–1994) 181 C.L.R. 41 to similar effect. She held, at page 441 in favour of a test based on reasonable apprehension of bias:

> *"However, there is no need to go further than this jurisdiction where it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the Appellants would not have a fair hearing from an impartial judge on the issue. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test — it invokes the apprehension of the reasonable person".*

The same test had been propounded by Keane C.J., in the same year, in Orange Communications Ltd. v Director of Telecoms (No. 2) [2000] 4 I.R. 159 at 186 as follows:

"While the test for determining whether a decision must be set aside on the ground of objective bias has been stated in different ways from time to time by the courts in the United Kingdom, there is, in the light of the two authorities to which I have referred, no room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias."

The two cases to which the Chief Justice referred were Dublin Wellwoman Centre Limited v. Ireland [1995] 1 I.L.R.M. 408 and Radio One Limerick Ltd. v. I.R.T.C. [1997] 2 I.R. 291.

In O'Callaghan v. Mahon [2008] 2 I.R. 514 at p. 672, Fennelly J. described the principles relating to objective bias to be applied as follows:—

> *'(a) objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial;*
> *(b) the apprehensions of the actual affected party are not relevant;*
> *(c) objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process;*
> *(d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses.'*

The above are illustrations of the description of the test to be applied in situations where there is

perceived objective bias, and also illustrations of the application of the test. Having regard to certain factual similarities and to the fact that the decision was given by Denham J. who devised the Irish test for objective bias it is worth looking in some detail at the WellWoman case.

Dublin Wellwoman Centre Ltd v Ireland [1995] 1 ILRM 408

Summary of the Facts

In 1992, Carroll J. was the chairwoman of the Second Commission on the Status of Women. In that capacity she wrote a letter to the Taoiseach dated 12 March, 1992, in which she indicated that it was the view of' the commission that women should have the right to avail of counselling and information in relation to abortion, as well as the right to travel abroad in order to obtain an abortion. In a statement to the government the commission expressed the view that the amendment to the protocol to the Maastricht Treaty proposed by the government, which would provide for the right of freedom to travel, was too narrow and should also provide for freedom of information and counselling.

The Fourteenth Amendment of the Constitution Act, 1992, amended Article 40.3.3, which guaranteed the right to life of the unborn child, so as to provide, inter alia, that it did not limit freedom to obtain or make available in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state. In its final report the commission expressed the view that legislation designed to implement this amendment should not contain unreasonable restrictions.

The plaintiffs brought proceedings seeking a declaration that in the light of Article 40.3.3 they could make available within the State information relating to abortion services lawfully available in another member state of the European Union and could inform pregnant women as to the identity, location and means of communicating with clinics providing such services. On 12 October, 1994, the plaintiffs' application came on for hearing before Carroll J. The third named defendant (Society for the Protection of Unborn Children) requested Carroll J. to discharge herself from hearing and determining the application on the grounds that her activities as chairwoman of the Commission on the Status of Women created a reasonable apprehension of bias. Carroll J. refused to do so because she was satisfied that she was not biased.

The following extracts from the decision of Denham J. for the Supreme Court are, it is submitted, of particular note:

> 'I am quite satisfied that the Learned High Court Judge was not lobbying on this issue, as

submitted by Counsel for the appellant. I am quite satisfied that she had no actual bias and I accept her judgment in full on the issue of subjective bias. However, the judgment did not address the matter of reasonably apprehended bias i.e. objective bias. It is on this issue that the High Court erred.

There is no suggestion or finding that the Court gave or would have given anything but an honest answer. But the test is objective; not whether the Learned High Court Judge considered she was or was not biased; nor whether the appellant considered the Judge was or was not biased; but whether a person in the position of the appellant in this case, a reasonable person, should apprehend that his chance of a fair and independent hearing by reason of the actions by the Learned High Court Judge in her capacity as Chairwoman of the Commission on the Status of Women would prevent a completely fair and independent hearing of the issues which arise. The apprehension of the reasonable person in the position of the appellant is what has to be considered.'
(page 31 of original report)

Judicial Practice

It has long been a practice of the judiciary in this State not to act as a judge in a case where they have an interest, or where there are grounds on which a reasonable person might fear that in respect of the issues involved he would not get an independent hearing. This is a convention which the Learned High Court Judge has herself practised in not unrelated circumstances previously. (page 32 of original report).

Abortion

The nature of the matter for consideration in this case is of particular importance and relevance. The issues of abortion and the related amendments regarding travel and information are perhaps the most emotive and divisive topic in our community today. The courts have to be ever vigilant to protect Constitutional rights, constitutional interpretation, and justice, and to be seen to be so.

It is a fundamental and age old concept in Common Law that Justice must manifestly and visibly be seen to be done. It is expressed now as Constitutional Justice. In cases such as this where many reasonable people in our community hold strong opinions, it is of particular importance that neither party should have any reasonable reason to apprehend bias in the Courts of Justice. Further, once the question of a possible perception of bias

has been raised reasonably on the grounds of pre-existing non-judicial position and actions, it would be contrary to constitutional justice to proceed with a trial.

I am satisfied that the Learned High Court Judge should have discharged herself. There is no question of a personal interest of the Learned High Court Judge no subjective bias. However, applying the test set out and the conclusions reached herein the appellant has made out the case of reasonably apprehended bias in the circumstances - objective bias. Consequently, I would allow the appeal. (pages 35-36 of original report).

The screenshots of Mr. Holohan's Twitter comments dated 25th of May 2018 are scheduled at Appendix 1 to these submissions.

The following are two relatively short extracts:

> *"My experience of this campaign is that the" No" campaigners such as Ronan Mullen have displayed no understanding, no love and no compassion. The "No" campaigners say that by maintaining the constitutional ban it will force women to think about what they are doing, if they have to travel to England for an abortion, and forcing them to think and forcing them to delay the abortion by having to travel might give them time to change their mind and thereby save the life of an unborn child. It might indeed do that in a handful of cases but for many thousands of women who decide to proceed this is a harsh cold and cruel punishment "for what you have done"*
>
> *"It is remarkable that those who shout "No" the loudest are the very people who aren't seen when issues of caring for those who do suffer from mental health problems arise. There not seen when issues of social justice arise. They are not seen campaigning for better health care for women they're not seen campaigning for free health care for infants, toddlers and children....."*

Two fairly obvious points need to be made about Mr. Holohan's Twitter comments by way of preliminary. Firstly, they are an unapologetic, uncompromising, aggressive, polemical call for the legalisation of abortion in the referendum and criticism of those on the other 'side' of the debate. Secondly, he was absolutely entitled to make them.

In terms of its 'position' on the abortion debate however Gianna Care – while a non-directive is of

the view that preventing abortion is in itself a valuable goal for both the unborn child and the mother of the child. It regards itself as a life-affirming organisation.

It is also a faith based organisation – and it sits very uneasily for them to be 'judged' by an individual who posts photos, in the context of a polemic about abortion, with the tagline "What if Christianity was a lie?" Mr. Holohan's further comment that if they are "truly Christian" the Irish people should vote yes to the abortion referendum may well be heartfelt, but it is not a stance which leaves much solace for a faith-based counselling agency appearing before him.

Mr. Holohan makes the point in his twitter comments that those who oppose abortion "are not seen when issues of social justice arise." This sweeping generalisation is like most generalisations entirely inaccurate but likewise doesn't bode well for someone who has a different view on the general issue – the "Pharisees" as they are described.

It is not our role to place a gloss on Mr. Holohan's comments. It does seem however - and couched in more expressive language than is used here – that Mr. Holohan is of the view that those who seek to place equal emphasis on the life of the mother and life of the child lack charity or a charitable world-view. In the context of a life-affirming organisation seeking to appeal a refusal of its charitable status that publicly stated (and obviously heart-felt) stance gives rise to a reasonable apprehension on behalf of a reasonable person that the organisation would not get a fair hearing from an impartial adjudicator.

The Appellant is further of the view that it was unfairly turned down for charitable status and it believes that its refusal was based on its stance towards abortion. While the comments by Mr. Holohan were made in the context of the abortion referendum, which is now past, the abortion issue remains something of a schismatic fault in Irish society. People are either on one side or the other – the Appellant is clearly not entitled to suggest that it should be judged by someone who is more sympathetic to the 'pro-life' side - but it is entitled to an adjudication by someone who has not nailed his colours to the mast in such a public manner while disparaging those on the other side in such strident terms.

Conclusion

The Appellant is seeking to be registered as a charity. It seeks to help women going through crisis pregnancies. It seeks to save the lives of unborn children. It sees no contradiction between these objectives. It is aware that many people do see such a contradiction. Based on the public comments of Mr. Holohan it is of the view that there is a real danger that it would not get not get -

despite his best efforts – an impartial hearing from him. More pertinently, a reasonable person in the circumstances would have a reasonable apprehension that the Appellant would not have a fair hearing from an impartial judge on these issues.

The following final points are made:

1. *The Tribunal should exercise the 'precautionary principle' – that it is easier to avoid the risk of unfairness or perceived unfairness than deal with the matter after the fact;*
2. *That the perception of objective bias is much greater here than in the Wellwoman case having regard to the polemical nature of Mr. Holohan's Tweets and having regard to the fact that he engages not just with the issues but his perception of those on the 'other' side of the debate;*
3. *That otherwise the points made by Denham J. in respect of abortion being among the most divisive of subjects remain as true now as they were thirty years ago;*

In the circumstances Mr. Holohan should not hear the Appeal

Cormac O'Ceallaigh
Solicitor
9th May 2025"

110. On 3 June 2025, the Regulator made Submissions which stated:

"THE CHARITIES APPEAL TRIBINAL (sic)
BETWEEN
GIANNA CARE CLG
APPELLANT
AND
THE CHARITIES REGULATOR
RESPONDENT

RESPONDENT'S WRITTEN SUBMISSIONS ON PRELIMINARY ISSUE

Introduction

1. *This case concerns an appeal by the Appellant against a decision made by the Respondent. This decision was to refuse an application to the Appellant to be registered in the Register of Charitable Organisations in accordance with the relevant provision of the Charities Act 2009 ("**the 2009 Act**").*

2. *On the morning of the hearing of that appeal, on 12 March 2025, the Appellant made a complaint of bias against two members of the Charities Appeal Tribunal ("**the Tribunal**"). Neither the Tribunal nor the Respondent were given advance notice of the application.*

3. *In light of the matters raised, the Tribunal invited written submissions on the issue. The following submissions are made in response to the written submissions of the Appellant.*

4. *It should be noted that while the application was originally made for the recusal of Ms. Fawsitt and Mr. Holohan SC, it appears that the application is now limited to an application for the recusal of Mr. Holohan SC. It should also be noted that no complaint of actual bias appears to be raised and the complaint made is one of objective bias.*

The Bias Complaint

5. *While the Respondent will refer to the publications in full for their true meaning and effect, in broad terms the publication is a tweet made on 25 May 2018 in which Mr. Holohan SC advanced what might be termed a* "pro-choice" *position regarding reproductive rights. This view encompassed some criticism for the then status quo that women may have to travel to the UK for an abortion and that not all such women might be able to travel. There was further concern raised about the potential for the taking of abortion pills. Mr. Holohan SC was critical of some on the pro-life side who he said to be lacking in compassion and understanding. In conclusion, the publication, in very broad terms, sought to advance a "Yes" vote in what was the upcoming abortion referendum.*

6. *The Appellant makes the case that this gives rise to a concern of objective bias in this case given that the Appellant is said to be a "*life-affirming*" organisation and has a goal of preventing abortion. The Appellant submits that while it is not entitled to be judged by someone who is more sympathetic to the pro-life side, it is entitled to an adjudication by someone who has not "*nailed his colours to the mast*" in such a public manner.*

7. *It is respectfully submitted that the Complaint in objective bias is not made out.*

The Law on Bias
Burden and Standard of Proof

8. *It is clear that there is a high burden on an Appellant raising a complaint of bias. Murphy J in* ***Orange Ltd. v. Director of Telecoms*** *(No. 2) [2000] 4 IR addressed the requirement of proof of the existence and the extent of a particular factor, emphasising that there is a threshold that must be met –*

> "a party asserting bias must prove, by appropriate evidence and to the required standard, not only the existence of a particular relationship, circumstance or factor but also that it falls outside the permitted limits." (para. 243).

9. *McGuinness J in* ***Bula v Tara Mines*** *(No. 6) [2000] 4 IR 412 at 441 held that:*

> "If the test of reasonable apprehension by a reasonable person (which is the correct test) is to be applied, I consider that it requires a strict interpretation. The apprehension must be reasonable and realistic; over scrupulous, fanciful or fantastic apprehension or a vague worry is not sufficient. While this is not of course, a criminal trial, there is, I think, some parallel with the standard explanation of a '*reasonable doubt*' contained in the judge's charge to the jury – a fanciful, exaggerated or over scrupulous doubt is not enough". (para. 509).

10. *These findings were described in the dissenting judgment of Hardiman J in* ***Goode Concrete v CRH PLC*** *[2015] 3 IR 493 as "*observations pertinent to both the burden and the standard of proof*". Hardiman J then emphasised the importance of this burden –*

> "...I would accept as has been urged upon me by counsel for the defendants that for that principle to be invoked requires a very high threshold of proof in order to protect the proceedings of the many and varied tribunals that sit on a daily basis in this jurisdiction from unmeritorious allegations designed to frustrate their proceedings."

11. *The Appellant now also complains that the Respondent was biased in that it refused the application based on the Respondent's stance towards abortion. There is no evidence for this and such an allegation should not have been made. It may be worthy of note that as identified by the Supreme Court in* ***Shatter v Guerin*** *[2019] IESC 9 that an allegation of bias (even an objective*

one) ought not be lightly made as it is an "ugly" allegation and should be brought with some care (para. 30). The fact that an allegation of bias was made against Ms. Fawsitt then dropped and now a fresh allegation has been made against the Respondent, is indicative of a casual disregard for the consequence of making such allegations – an approach that has been criticised by the Supreme Court in ***Shatter****.*

The Test

12. There is no great controversy on the applicable test which was definitively stated by Denham J. in ***O'Callaghan v Mahon*** *[2008] 2 IR 514 and is not in dispute in this Application –*

> "...the test to be applied in determining whether there is objective bias is whether a reasonable person, with full knowledge of the circumstances, would consider that there are external factors which would cause the decision maker to make a particular decision, or would inhibit him from making a decision impartially, as would give rise to a reasonable apprehension of bias." (para. 81).

*13. It should be noted in any application of the test that the approach that this Tribunal ought to adopt is to consider the reasonable person with full knowledge of the circumstances - it is not the subjective view of the person raising complaint. In this regard Denham J. highlighted that "*Concerns stated by a party are not proof of bias, partiality or unfair procedures. Indeed, if "concerns" could derail a case no independent inquiry would ever proceed.*" (para. 145).*

14. Insofar as significant reliance has been placed on the case of ***Dublin Wellwoman Centre v Ireland*** *ILRM 408 this requires careful consideration. The issue in* ***Wellwoman*** *was that a judge who was hearing the case had written to the Taoiseach on behalf of an organisation, advocating a particular position on the right of women to counselling, information and travel on the issue of abortion. The plaintiffs brought proceedings seeking a declaration that in the light of Article 40.3.3 they could make available within the State information relating to abortion services lawfully available in another member state of the European Union. In this regard, it must be noted that there was an extremely close connection between the external factor (previous statement of the judge) and the matter at issue (right to provide information on abortion services). As set out below, the Courts have recognised the importance of analysing this nexus in any consideration of a complaint of bias.*

15. In this regard, a very recent but important judgment of the Supreme Court in ***Kelly v UCD*** *[2025] IESC 6 assisted in delineating the meaning of objective bias in Irish law and how the*

dilemma should be approached by a Judge (or in this case a Tribunal) when faced with an allegation of bias. In short, it was stated that public confidence in the adjudicative function remains to the forefront of the assessment of bias. The question boils down to whether:

> *"the reasonable and informed onlooker would have a reasonable apprehension that the judge would not be able to give the matter an impartial hearing and decision by reference only to the facts and law". (O'Donnell CJ, para 2).*

16. The apprehension of bias involves a two-stage test. Namely, it requires an:

(i) Identification of what is said that might lead the judge to decide a case other than on the legal and factual merits and

(ii) The articulation of a cogent, rational and logical connection between that matter and the feared deviation from the course of deciding the case on its merits (para. 57).

*17. Therefore, it is necessary for the Appellant to not alone identify the comments of Mr. Holohan SC (that are allegedly prejudicial to the Appellant) but to causally link those comments to the contention that Mr. Holohan SC will deviate from determining this case on its merits – which is not the merits of the abortion debate – but whether the Appellant (Gianna Care) falls within the statutory definition of "*charitable organisation*" pursuant to section 2 of the Charities Act 2009.*

18. This appeal is not about the rights or wrongs of abortion or abortion rights. This case is about whether or not the Respondent's decision, in refusing an application for charitable status, was correct under the relevant provisions of the Charities Act 2009. Section 39(5) of the 2009 Act sets out detailed provisions regarding applications for charitable status and, under Section 39(8), the Authority is obliged to refuse an application under that section unless satisfied that the Appellant is a charitable organisation. It is unnecessary here to set out the reasons of the Respondent, but it suffices to say that they were narrow – relating to concerns around a lack of written procedures regarding the referral of women for scans without medical oversight or follow up processes. Whether the Respondent was correct on this is now an issue for the Tribunal but it is submitted that the connection between the complaints and the matter at issue fall far from meeting the threshold required for objective bias.

Precautionary Principle

19. *The Appellant concludes that the Tribunal should exercise the "*precautionary principle*" in respect of the allegation of bias made and that Mr. Holohan SC should err on the side of recusing himself on that basis. The Respondent refutes this and contends that this is an error of law.*

20. *The Supreme Court in* ***Kelly*** *explicitly noted that such an approach should be deprecated as otherwise the administration of justice may grind to a halt as the day to day work of the judiciary (or a Tribunal) would be interrupted by "any objection however flimsy to avoid controversy" and cited the comments of Sir Anthony Mason in* ***Re JRL; Ex parte CJL*** *(1986) 161 CLR 342:*

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

21. *Moreover, O'Donnell CJ explicitly states that the decision in respect of recusal "*is not to be determined by some precautionary consideration that it might have been better not to sit, or some wise after-the-fact assessment that a problem might have been avoided by not sitting*". (O'Donnell CJ, para 10).*

22. *The Supreme Court in* ***Kelly*** *noted that while pragmatism can be and regularly is a factor taken into account by Judges of the High Court who may consult with the President of their Court or with other colleagues where another judge is free to sit in their place without difficulty or inconvenience such arrangements are driven by pragmatism.*

23. *The allegation of bias here cannot be solved by such a pragmatism given the nature of the Tribunal. In this regard, there exists a principle in law of "*necessity*" which must be considered in any application for recusal on the grounds of bias. In this regard Hogan and Morgan (5th Edition of their book Administrative Law) state (at 14-91) that: "*Clearly, the existence of a necessity depends, in substantial measure, upon the content of the particular statute and other circumstances*." They later say (at 14-92) that* "the rule of necessity is compatible with constitutional justice. For, as has been seen, constitutional justice is grounded in Art.40.3, the rights contained in which are not absolute but qualified by such phrases as "as far as

practicable" and "as best it may". *In this regard, and in considering this application, the Tribunal is entitled to consider the following aspects of the statutory scheme which militate against the application:*

i) The procedure for the appointment of the Tribunal members under Section 75 of the 2009 Act with particular expertise and requiring ministerial appointment;
ii) The provision for majority decisions to be made under Section 77 of the 2009 Act;
iii) The fact that there does not appear to be any provision providing the Tribunal to sit with a lesser number.

Conclusion

24. For the reasons which are set out above, it is submitted that the application for recusal should be refused and the substantive appeal should proceed.

Brian Gageby"

111. The Hearing resumed on 9 July 2025, with all Tribunal Members present.

REPRESENTATION OF THE PARTIES AT THE RESUMED HEARING ON 9 JULY 2025.

112. On behalf of the Appellant:

Mr Cormac Ó Ceallaigh, Solicitor.
Ms Alice Bowie, Ó Ceallaigh Solicitors.
Elizabeth McDermott, Gianna Care CLG.
Michael Moore, Gianna Care CLG.
Mark O'Leary, Gianna Care CLG.

113. On behalf of Respondent:

Alan Fitzgerald Charities Regulatory Authority
Brian Gageby, Barrister.

114. The Chairperson opened the Proceedings indicating that this was a resumed sitting of the Charity Appeals Tribunal which had last met on 12th March 2025 in relation to an appeal against the decision of the Charities Regulator who had refused to recognise Gianna Care as a charity. On that occasion an issue arose in relation to an application made by Mr Cormac Ó Ceallaigh, Solicitor for the Appellant that two of the members of the Tribunal should recuse themselves.

115. The Chairperson indicated that before he would open the matter formally, he was going to ask all persons present to introduce themselves, for the record. He then introduced himself as Pat O'Connor, the Chairperson of the Tribunal, a qualified solicitor for 50 years and said that he had a lot of experience dealing with Tribunals. He said that he was a coroner for 45 years also in relation to various matters and he had just retired from that position in the previous few months.

116. Tribunal member Dr Bill Holohan SC then introduced himself as a solicitor and Senior counsel.

117. Tribunal Member Ms. Carol Fawsitt introduced herself as a retired solicitor and as a member of a number of, and a former member of boards of various charities.

118. Tribunal Member Karen Horgan confirmed that she had been working in the charity sector for over 20 years.

119. Tribunal Member Nuala Dockry BL confirmed that she was a barrister with over two decades' experience at the Bar.

120. Mr. Ó Ceallaigh then introduced himself as a solicitor, and introduced Ms Alice Bowie, a legal assistant. Ms Elizabeth McDermott a director of Gianna Care, then introduced herself.

121. Mr Brian Gageby, then introduced himself as a barrister at law, instructed by Mr Alan Fitzgerald on behalf of the Charities Regulator.

122. The Chairperson, addressing Mr Ó Ceallaigh, said that on 6th June he had received a letter from the secretariat acknowledging the Appellant's submission and also pointing out the slight delay which had occurred in the filing before the deadline of 9 May. The Chairperson indicated that the Tribunal was not

making an issue in relation to the late furnishing of that Submission pointed out or that the correspondence from the Secretariat had also reminded Mr. Ó Ceallaigh in that letter of what the Tribunal had indicated on the 12th March, that *all* of the social media posts that had been referred to, particularly in relation to Mr Holohan, would be furnished and he asked was that done? Mr. Ó Ceallaigh responded that the documentation furnished were the only posts he had which are in the papers specific to this matter.

123. The Chairperson indicated that the information and the knowledge that the Tribunal Members had was that there was a selective attribution of some of those matters, and that the entire Twitter feed was not in fact made available by Mr Ó Ceallaigh. Mr. Ó Ceallaigh said that what had been submitted was the only information with which he had been furnished by his client. The Chairperson asked Mr. Ó Ceallaigh who furnished Mr. Ó Ceallaigh with the documentation submitted and Mr. Ó Ceallaigh confirmed that it was his client who had furnished the documentation to him. He explained that he was not on Twitter himself and did not know how it works, but they were the screenshots of the feed. He said that he understood the Twitter comments that are in the papers, each connects into the other from what he could read. He said that there was "*a flow*".

124. The Chairperson pointed out to Mr. Ó Ceallaigh that there was in fact a Twitter feed of 24 sections and that Mr. Ó Ceallaigh had only submitted 16 selected extracts out of 24. Mr. Ó Ceallaigh suggested that he was not aware of that.

125. The Chairperson asked Mr. Ó Ceallaigh if he was saying that he was not instructed in relation to that to which Mr. Ó Ceallaigh responded that he had asked to be furnished all. The Chairperson asked Mr. Ó Ceallaigh if he was saying that he had not been furnished with the full thread and Mr. Ó Ceallaigh said that "*What I got is what I have*".

126. The Chairperson said that he wanted to be clear, stating that the Tribunal were requested on a preliminary basis to consider the recusal of two members on the last hearing on 12 March i.e. Ms. Carol Fawsitt and Mr Bill Holohan. He pointed out to Mr. Ó Ceallaigh that was the submission that was made by Mr Ó Ceallaigh, for the Appellant, and in the covering letter, Mr. Ó Ceallaigh indicated that he was withdrawing the objection in relation to Ms. Fawsitt being on the Tribunal. Mr. Ó Ceallaigh confirmed that was correct.

127. The Chairperson pointed out that there was no reason given for the original application and there was no reason given as why the withdrawal was then made, nor was there any reference made to the effect that that might have had on Ms. Fawsitt or on the Tribunal. Mr. Ó Ceallaigh said that his instructions on the last date were received very late in the day in terms of making the objection, so he was acting on very late instructions/late notice. He said that after the last hearing and on further consideration and deliberating the matter further with the clients, it was felt that it was appropriate not to proceed any further regarding Ms. Fawsitt's comments.

128. The Chairperson said that Mr. Ó Ceallaigh would no doubt recall on the last occasion the Tribunal did make the point that the application was made very late and with no prior notice to the Tribunal. Mr. Ó Ceallaigh said that he would accept that. The Chairperson pointed out to Mr. Ó Ceallaigh that that did cause, obviously, some concern to the Tribunal Members and of course to the Respondent and that on the occasion when he had made his application, the Tribunal did decide that ultimately the best way of dealing with it was that there would be formal written submissions made by Mr. Ó Ceallaigh on behalf of his client in relation to the matter. Mr. Ó Ceallaigh acknowledged this.

129. The Chairperson pointed out that Mr. Ó Ceallaigh had then produced Submissions, without supporting authorities but that the authorities then arrived later on. Mr. Ó Ceallaigh acknowledged that. He then pointed out that subsequently submissions prepared by Mr. Gageby on behalf of the Regulator had been submitted which Mr. Ó Ceallaigh now had. Mr. Ó Ceallaigh acknowledged this.

130. Tribunal Member Bill Holohan, addressing Mr Ó Ceallaigh, said he would reference a procedural point. He pointed out that the Chairperson had directed that the full text of the 24 sections of Mr Holohan's May 2018 thread be made available to the Tribunal. Given that Mr. Ó Ceallaigh had indicated he had not been furnished with the full 24 sections by his client, and given that the full 24 sections were available to the Tribunal, he asked whether Mr. Ó Ceallaigh wanted to see those 24 sections before the Tribunal would proceed given that the Tribunal has the full text available to it, even though Mr Ó Ceallaigh's client, for whatever reason, did not furnish Mr. Ó Ceallaigh with the full 24 section thread. Mr. Ó Ceallaigh it would certainly be helpful to look at them. Mr Holohan said he would email them to Mr Ó Ceallaigh, Mr. Ó Ceallaigh confirming that he had his laptop with him.

131. Mr Holohan said that he would consider it important that Mr Ó Ceallaigh's client, if they were genuinely unaware of the full thread or it was for some reason inaccessible to them, that they would have the

benefit of the full 24 section tweet, in order to be able to consider the totality of it. He suggested to Mr. Ó Ceallaigh that Mr. Ó Ceallaigh might also take instructions on the circumstances in which he was only furnished with 16 of the 24 sections of the May 2018 Tweet. Mr Holohan said that if Mr. Ó Ceallaigh needed time to consider the matter with this client, the Tribunal could rise to allow him and his clients that time. Mr. Ó Ceallaigh said that he might take a few minutes. He provided his email address, and Mr Holohan emailed the full 24 sections of the tweet to Mr Ó Ceallaigh.

132. The Chairperson indicated that when Mr. Ó Ceallaigh had considered that, he might also advise the Tribunal whether, as seems to be the case from reading the papers, a review of all the Tribunal members was made by the Appellant in relation to their status and their situation. Mr. Ó Ceallaigh acknowledged this. The Chairperson said that he would also like to be informed, if so, why was that done?

133. Tribunal Member Mr. Holohan asked Mr. Gageby if he needed to see the full thread as well. Mr. Gageby responded saying that he was taking an instruction on that. He said that he thought not, but part of the test he supposed, was that a person who is the reasonable person would be in the knowledge of all material facts, and if that's a material fact he supposed it was something which maybe he might need as well in order to make a submission. Mr Holohan emailed the full text of the 24 sections of the Tweet to Mr Gageby.

134. The Chairperson said that it was a net issue that the Tribunal Members wanted to enquire from the Appellant whether or not they had the tweet, the full 24 sections of the tweet itself and also if they did, why did the Appellant not brief Mr. Ó Ceallaigh in relation to it and why were they selective in the actual presentation. Mr. Ó Ceallaigh said that he would appreciate if the Tribunal could possibly rise for a few minutes so that he could take instructions.

135. The Tribunal rose for a short period.

136. On resumption of the hearing the Chairperson enquired of Mr. Ó Ceallaigh if he had anything to say. In response, Mr. Ó Ceallaigh said that his client was very anxious to point out there was absolutely no intention to mislead the Tribunal in terms of 16 out of 24 tweets that were furnished. He said that they (the 16 sections of the May 2018 tweet by Mr Holohan "*were the tweets that were gathered*" and they were the only tweets furnished to Mr Ó Ceallaigh. He said that he had had a "*quick look at the additional tweets*" and indicated that "*in my view nothing turns on them insofar as it doesn't in any way affect the*

position I adopted or what's in my submission". He said that he thought that "*If anything, I think it reinforces the points I made in my submissions*". The Chairperson noted this response.

137. Mr. Ó Ceallaigh said that in terms of the other query as to whether the Appellant did check out the details of the members of the Tribunal, his instructions were that they did, but again he said that he did not think anything turns on that. He said that that was "*normal thing to do in something as significant as this*". He said that this was a very significant decision for his client i.e. to get registered or not get registered as a charity. He said that in fact a lot of the case law were similar situations where people make enquiries in respect of judges or decisions that are made and that's why a lot of these cases had arisen. He said he was not sure what the inference is or can be drawn. He asked if there was something incorrect or improper in checking, i.e. for the clients to check who the members of the panel were and what their views were?

138. The Chairperson said that he was not making any judgment at all and was just asking the questions and that he thought he was entitled to ask those questions. He said that if the Appellant had checked out the members of the Tribunal, that was fine but that the members of the Tribunal just wanted to know that. Mr. Ó Ceallaigh acknowledged this. The Chairperson said that clearly the Appellant had checked out two of the members particularly and made what turns out to be a totally unmeritorious allegation against Ms. Fawsitt and then withdrew it, but without apology or otherwise to her. The Chairperson said that an allegation of bias, whether it was an allegation of objective bias or otherwise, should be very carefully considered before it being asserted. Mr. Ó Ceallaigh said that he would accept that.

139. The Chairperson said that the law is quite clear in relation to the issue of allegations of bias. Mr. Ó Ceallaigh said that he would acknowledge that. The Chairperson said that in any event, the Tribunal had considered very carefully the very able submissions submitted by Mr. Ó Ceallaigh and by Mr. Gageby BL in relation to this matter. He said that in the first instance, he thought it was important to say that the Tribunal were unanimous in their views in relation to Gianna Care that they had not come to any decision in relation to the substantive matter at all.

140. The Chairperson indicated that the second thing was that there was no indication whatsoever in any of the papers that were submitted to the Tribunal for the hearing on 12th of March, or indeed subsequently, apart from what had been mentioned in the submissions from Mr Ó Ceallaigh, that Gianna Care was what they refer to as "*a life affirming*" organisation. In other words, pro-life as it is probably better known as in

this country and, certainly, there was no indication that it was providing either abortion services or services relating to abortion, and that did not come clear to the Members of the Tribunal until the actual day of hearing, the 12th March that that was the situation. He said that certainly from the papers, each of the members of the tribunal did not make any decisions or take any view in relation to part. He said that in any event, the rights or wrongs of abortion or abortion rights are not what this appeal is about. He said that it is an appeal on the law whether Gianna Care satisfies the criteria set out in the Charities Act, section 2, as to whether or not it is a charitable organisation.

141. The Chairperson said that it was noted on the last occasion that Mr. Ó Ceallaigh appeared to have accepted that the Gianna Care, his client, indicated that they operate within the charity sector, which is incorrect because they are not a charity, and they should not be using that description this stage. He pointed out that the appeal itself was still outstanding.

142. The other matter that he said was important to bring to the attention of Mr. Ó Ceallaigh and the Appellant, was a matter which was referred to in Mr. Gageby's submission, which was that the Tribunal can only sit if there are five members. If there are not five members sitting, then the Tribunal cannot sit because it is a Tribunal of five members. He said that that was not a reason why the Tribunal would make a decision whether a member or otherwise would recuse themselves or not, if there were valid reasons for doing that. But, said that it was important to state that and the law is quite clear in relation to it (a matter which should have been known to Mr. Ó Ceallaigh and should have been made clear to his client).

143. The Chairperson continued saying that the other matter that was important to bring to the attention of Mr. Ó Ceallaigh is that in making a submission that one or other, or in the first instance two people and now subsequently just one person should recuse themselves, it created a slight on the other members of the Tribunal in that it indicated that in some way or other that the individual who was asked to recuse themselves had either a dominant or a countervailing, sort of, decision process which in other words would influence the other four Tribunal members, all of whom are very ably qualified, some with considerable experience of over 50 years in the law, and others with considerable experience in the charity field. So, the net effect of suggesting that one or other of the Tribunal members were in any way to recuse themselves because of some indications that they may have given in social media in the past, did and does create a situation where all of the Tribunal are effectively tainted by that allegation because

the assumption is then that that one person or two people, one person now being talked about, would have a dominant effect on the decision-making process, and that was factually incorrect.

144. The Chairperson continued saying that the other aspect of the matter is that, as he had indicated to Mr. Ó Ceallaigh previously, but he would repeat it again, this appeal is not about the rights or wrongs of abortion rights. It is a case whether or not the Respondent's decision, in other words the Charity Regulator's decision in refusing an application for charitable status was correct under the relevant provisions of the Charities Act and it seems from Mr Ó Ceallaigh's submission, that in some way or other his client indicates that a decision was taken by the Regulator because of the views and the manner in which his client operates and/or the social outlook, political outlook, religious outlook or otherwise of his client. That, he said, is not what this appeal is about. That is not what the application is about at all, and it is incorrect to set that out.

145. In relation to the situation of Tribunal Member Mr Holohan, he said that the Tribunal had very, very carefully considered the Submissions that had been made and all of the case law, and he was not going to repeat the submissions at that stage other than to say that the Tribunal Members were very glad that Mr Ó Ceallaigh, had an opportunity of making his submissions in relation to the law and that Mr. Gageby on behalf of the Respondent did also.

146. In relation to the actual decision-making process itself, he said that he had already outlined that this is a Tribunal of five people, not just one person and most, if not all of the case law, relates to an application being made to recuse an individual who is making a sole decision save and except in the case of the Mahon Tribunal where the Mahon Tribunal matter was on a completely different note and had not any relevance to the perceived objective bias of the Tribunal in that case. But all of the other cases related to individual judges who were asked to recuse themselves or other issues that arose in relation to it. He said that the point that he was making there, of course, is that this is a Tribunal of five people, not just one person.

147. He said that the Tribunal will give reasons for the decision within the next few weeks so that the Appellant can consider them but having considered all of the facts, all of the Submissions and all of the information that had been furnished by Mr Ó Ceallaigh, and that the Regulator has furnished to the Tribunal. The Tribunal has decided to refuse the application to have Mr Holohan recuse himself and he confirmed that the tribunal will proceed with the substantive appeal by the Appellant, if they wish to

continue that appeal and in that regard, to try and keep matters moving, bearing in mind that time is getting on, the Tribunal had set the hearing date of the substantive matter for 20 November at 11:00am. He said that the hearing venue would be confirmed in due course.

148. Mr. Ó Ceallaigh said that while it may not be relevant, he was anxious to put something on record. He said that the Chairperson referred to Gianna Care referring to themselves as a charitable organisation and he said he suppose that he was just anxious to put some balance with that. He said that there has been no suggestion in the paperwork that they refer to themselves as a charitable organisation in the context of a registered charity and he did not think the intent behind the legislation was that the Charity Regulator would have some ownership of the term "charity". He said it was used in the most general sense. He said that the Appellant was not holding themselves out as a registered charity, and that he did think there is a subtle distinction between an organisation calling themselves a charity in a general sense that they are a not-for-profit, as opposed to an organisation referring to themselves as a registered charity. He said that not a huge amount turns on it, and that he was just anxious to make that point.

149. Addressing Tribunal Member Ms. Fawsitt, Mr. Ó Ceallaigh said that if it was helpful, he would obviously apologise that she was "*ambushed on the last occasion with this*" but said that he "*was working on instructions*" and he supposed, to his clients in their favour, that they are balanced in their views and having considered it further and having considered the argument in a bit more detail, the view was not to proceed any further against her. Ms. Fawsitt said that that was accepted. Mr. Ó Ceallaigh said he would offer apologies if any upset or distress was caused. Ms. Fawsitt said that that was accepted.

150. Tribunal Member Mr. Holohan said that as he had indicated on the last occasion, he was taking no offence to the challenge, but that he was intrigued at an intellectual level in relation to it and said that remained the case. Mr. Ó Ceallaigh acknowledged this.

151. Mr. Gageby said that it was not an issue now and he did not want the Tribunal to make any determination or need any determination on it, just simply to say in terms of the use of the word "*charity*" and "*charitable organisation*", the Regulator would take a different view to that advanced by Mr. Ó Ceallaigh on behalf of the Appellant. He said that he would just put that on the record, but otherwise he had nothing further to say on that.

152. The Chairperson said that he thought that in fairness to Mr. Ó Ceallaigh the wording was "*working within the charity sector*", but there was not any use of the word that they are a charity, and that was not taken up by the Tribunal certainly. He said that in any event, that was a matter that the Tribunal would have to decide at a later stage, but it was not relevant to the current stage of the proceedings.

153. The Chairperson enquired if Ms McDermott of the Appellant wished to say something. Ms McDermott said that whatever might be submitted on their behalf, the Appellant was always at pains to use the word "non-profit organisation" which she thought was the "*legally correct phraseology*". She said that she was a former practising solicitor herself, so she was quite conscious of not using misleading terms and she was aware of the Charities Regulations in relation to that. She said that the Appellant did not try and mislead the public. The Chairperson responded saying that he would just bring it to her attention, it was not a matter that would form any part of our deliberation or otherwise and would not influence the members of the Tribunal in any way, good, bad or indifferent. He said it was just to point out what the law is and bearing in mind that the Tribunal itself is a Tribunal at law and just dealt with the actual legal factual background. He said that what is the political outlook or the social outlook, or the religious outlook or the moral outlook of any organisation, is not a matter for the Tribunal and the Tribunal would not be considering that in any way.

DETERMINATION.

154. The Submissions submitted by both parties dealt comprehensively with the question of bias. Denham J. in O'Callaghan v Mahon[10] said that in respect of bias:

> *"…the test to be applied in determining whether there is objective bias is whether* ***a reasonable person****, with full knowledge of the circumstances, would consider that there are external factors which would cause the decision maker to make a particular decision, or would inhibit him from making a decision impartially, as would give rise to* a reasonable apprehension *of bias."*
> (Para. 81 - Emphasis added)

155. The same test had been applied by Keane J in Radio Limerick One Ltd V Independent Radio and Television[11] where he referred to "*the apprehension of bias in the minds of* ***reasonable people***" (emphasis added) and by Kelly J in Bane V Garda Representative Association[12] and by McGuinness J in Carroll V Law Society[13] [2000] 1 ILRM 161. As referred to by McGuinness J in Bula Ltd V Tara Minds Limited (No. 6),[14] the matter of apprehended bias was fully discussed by Denham J in Dublin Wellwoman Centre Limited V Ireland[15] when she considered the appropriate test as applied by Finlay CJ both in O'Reilly V Cassidy (No. 1)[16] and in O'Neill V Beaumont Hospital Board:[17]

> *"What… is at issue is the objective test: as to whether the person in the position of the appellant in this case, being a reasonable person, should apprehend that his chance of a fair and independent hearing of the question at issue does not exist by reason of the previous nonjudicial position, statements and actions of the learned High Court Judge on issues which are at the kernel of the case".*

156. The Supreme Court in Kelly v UCD[18] [2025] IESC 6 stated that the question of bias comes down to whether:

[10] O'Callaghan v Mahon [2008] 2 IR 514.
[11] Radio Limerick One Ltd V Independent Radio and Television [1997] 2 IR 291.
[12] Bane V Garda Representative Association [1997] 2 IR 449.
[13] Carroll V Law Society [2000] 1 ILRM 161.
[14] McGuinness J in Bula Ltd V Tara Minds Limited (No. 6) [2000] 4 IR.
[15] Dublin Wellwoman Centre Limited V Ireland [1995] 1 ILRM 408.
[16] O'Reilly V Cassidy (No. 1) [1995] 1 ILRM 306.
[17] O'Neill V Beaumont Hospital Board [1990] ILRM 419.
[18] Kelly v UCD [2025] IESC 6.

"the reasonable and informed onlooker would have a reasonable apprehension that the judge would not be able to give the matter an impartial hearing and decision by reference only to the facts and law".

157. In Bula Ltd v. Tara Mines Ltd (No. 6)[19] Denham J. stated:[20]—

"It is well established that ***the test to be applied is objective, it is whether a reasonable person*** *in the circumstances would have a reasonable apprehension that the Appellants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test — it invokes the apprehension of the reasonable person".*
(Emphasis added).

158. In as much as Fennelly J in O'Callaghan V Mahon said that

"objective bias may be established by showing that the decision-maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses"

this requires the identification of "*the case at issue*" and evidence of "*prejudice, hostility or dislike towards one party or his witnesses*".

159. In the case of Orange Ltd. v. Director of Telecoms. (No. 2),[21] Justices Geoghegan, Barron and Murphy dealt with the question as to whether there was factual evidence to support a claim of apprehended bias. They referred in this context to the English case of Locabail (U.K.) Ltd. v. Bayfield Properties Ltd,[22] a judgment of the UK's Court of Appeal. That case dealt extensively with the disqualification of judges and with the facts which may give rise to a need for disqualification. In the headnote it is stated, at p. 66:

"In considering whether there is a real danger of bias on the part of a judge, everything depends on the facts, which may include the nature of the issue to be decided. However, a judge's *religion, ethnic or national origin, gender, age, class, means or sexual orientation cannot*

[19] Bula Ltd v. Tara Mines Ltd (No. 6) [2000] 4 I.R. 412.
[20] Bula Ltd v. Tara Mines Ltd (No. 6) [2000] 4 I.R. 412 at p. 441.
[21] Orange Ltd. v. Director of Telecoms. (No. 2) [2000] 4 I.R. 159.
[22] Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. [2000] 1 All E.R. 65.

> *form a sound basis of an objection**. Nor, ordinarily, can an objection be soundly based on the judge's social,** educational, service or employment **background or** that of his family; his previous political associations; his membership of social, sporting or charitable bodies; his Masonic associations, his previous judicial decisions, **his extracurricular utterances**; …"*
> (Emphasis added).

160. In this context, inasmuch as the Appellant asserts that the "*extracurricular utterance*" in the form of the May 2018 Tweet from Tribunal Member Bill Holohan can form a "*sound basis for an objection*", the Tribunal does not agree. The Appellant correctly identifies that the question raised by the Appellant in relation to the issue of bias turns on the question of objective reasonableness (as distinct from subjective belief) and

> *"**whether a reasonable person** in the circumstances **would have a reasonable apprehension** that the Appellants would not have a fair hearing from an impartial judge on the issues."*
> (Emphasis added).

161. The Tribunal is of the view that prior to the opening of the initial hearing, in relation to the question of whether or not the Appellant had or did not have a pro-life stance, there was nothing in the documentation furnished to the staff of the Regulator and later to the Tribunal members, in respect of the Application made on behalf of the Appellant, to indicate that the "*life affirming*" stance of the Appellant nor was there anything in the documentation which was considered in processing the application for registration in any way relevant to the "*life affirming*" stance of the Appellant and the legal issues arising for assessment by the staff of the Regulator and consideration of the Appellant's Application by the staff of the Regulator.

162. The question of what stance, if any, the Appellant held in relation to the question of abortion and whether or not it had a "*life affirming*" stance had not occurred to or featured in any of the minds of any of the members of the Tribunal, prior to the opening of the hearing of the Appeal, and absent the intervention of the Appellant in referring thereto and seeking to make an issue of that stance, it would not have occurred to or formed part of or featured in the consideration by the members of the Tribunal of the Appellant's Appeal.

163. Whether or not the Appellant had or did not have a pro-life stance, only became an issue (relevant or otherwise) as a result of the Appellant asserting that it constituted an issue, and it was only because of that, that the matter arose for consideration as a possible issue, relevant or otherwise. The Supreme Court in O'Callaghan held that the question to be asked was:

> *"whether there was a basis, external to the decisions of the respondents, from which **a reasonable person would have a reasonable apprehension** that the respondents prejudged the credibility of the relevant witnesses".*
> (Emphasis added).

165. The Supreme Court in O'Callaghan held that the test to be applied in establishing objective bias was whether:

> *"a reasonable hypothetical person was not unduly sensitive and had knowledge of all the relevant facts and circumstances would have a reasonable apprehension that the decision-maker would not be fair and impartial"*

and that

> *"the apprehensions of the actual affected party were not relevant".*

166. In circumstances where, prior to the opening of the initial hearing, there was nothing in the documentation furnished to the Regulator and/or the members of the Tribunal to indicate that the Appellant held a “life affirming” stance, the Tribunal does not accept that the Appellant was approaching the matter from the point of view of or from the position of “*a reasonable person*” with “*a reasonable apprehension*”.

167. The Tribunal is satisfied that there was no evidence that Tribunal Member Bill Holohan, prior to the opening of the initial hearing, would have "*prejudged the credibility of the relevant witnesses*". The Tribunal is satisfied that there was nothing by way of evidence, as distinct from the subjective opinion of the Appellant, that Tribunal Member Bill Holohan would display "*prejudice, hostility or dislike*" to the Appellant or its witnesses.

168. The Appellant describes the 2018 Tweet from Tribunal Member Bill Holohan as:

> *"an unapologetic, uncompromising, aggressive, polemic call for the legalisation of abortion".*

169. The Appellant in its Submission describes itself as "*a life-affirming organisation*" and as "*a faith-based organisation*." The Appellant's Submission describes "*people*" as being "*on one side or the other*" (in relation to the question of abortion) and consequently clearly infers that in advance of the hearing, without any other evidence, the Appellant formed the view that Tribunal Member Bill Holohan is or would not be "*sympathetic to the 'pro-life' side*" and that Tribunal Member Bill Holohan is not a person of faith and is not life affirming and that consequently that the Appellant would not get "*a fair hearing from* [Bill Holohan as] *an impartial adjudicator*".

170. The Appellant patently did consider that, on an objective basis, it is legitimate, and perfectly reasonable and possible for the issue to be seen as more complex than that binary categorisation as asserted by the Appellant and that it might be possible for a lawyer, with four academic law degrees including a Masters in Advanced Legal practice and a Doctorate in mediation, and with over 40 years in practice in legal practice, i.e. someone, like Tribunal Member Bill Holohan, to be, at the one and the same time,

(i) a person of faith,

(ii) a life affirming person,

and while possibly

(iii) personally opposed to abortion as a matter of personal choice, (as distinct from medical necessity),

could at the same time, as such a legally qualified professional, a jurist, and a civil libertarian, be

(iii) in favour of allowing individual freedom of conscience in relation to such a moral matter,

(iv) in favour of personal and individual freedom of choice in relation to such a moral matter,

(v) in favour of medical intervention, possibly resulting the termination of pregnancy, when considered medically necessary to preserve life,

under and in accordance with the law.

171. The Tribunal is of the view that the Appellant formed its view of Mr Holohan (and initially of Ms. Fawsitt) without ascertaining all relevant facts, i.e., the Appellant made a conclusion in the absence of certain information, that is to say that the appellant prejudged the situation leading it to make its legal submissions in support of its application that he recuse himself.

172. The Tribunal is also of the view that that on an objective and reasonable assessment of the totality of the 2018 Tweet by Tribunal Member Bill Holohan, (and not just the 16 selective extracts out of 24 relied upon by the Appellant and submitted by the Appellant with its Submissions), it might be possible to consider what has been described by the Appellant as:

"an unapologetic, uncompromising, aggressive, polemic call for the legalisation of abortion",

can, objectively and reasonably, be seen as a principled and morally conscientious call for:

(i) the deletion of a constitutional imposition of a sectarian (in the true sense of that word) religious or moral code, in order to allow for individual and personal freedom of conscience in relation to a highly personal moral matter,

rather than simply an anti "*pro-life*" and "*unapologetic, uncompromising, aggressive, polemic call for the legalisation of abortion*. The Tribunal has also of the view that the "offending" tweet could be regarded as a principled and morally conscientious call for a legislative code that would allow for medically necessary intervention where and when required. The Tribunal is of the view that the Appellant was "*unduly sensitive*" and that however genuinely held, the "*life affirming*" stance of the Appellant has led the Appellant into error in viewing the actions of the Regulator, and the social media comments in the form of the tweets from Tribunal member Ms. Fawsitt and Tribunal Member Mr Holohan, through an entirely subjective prism of expectation of bias.

173. The Appellant states in its Submission that it is the subjective belief of the Appellant that:

"it was unfairly turned down for charitable status".

While this may be the subjective belief of the Appellant, there is no objective evidence whatsoever of any unfairness, as alleged or otherwise, as distinct from the Appellant's subjective belief as to the existence of unfairness. In this regard, the Tribunal does not agree with the allegation of the Appellant. It is also noted that no such allegation had been made in the Grounds of appeal, and no liberty was sought by the Appellant from the Tribunal to seek to introduce additional grounds of appeal.

174. The Appellant also goes further in its Submissions and states in its Submission that the "*refusal* [of the Appellant's Application by the Regulator] *was based on its* [pro-life] *stance towards abortion*". While this may be the subjective belief of the Appellant, it is a fact that in the documentation submitted to the Tribunal Members, there is no evidence whatsoever that this is the case, and there is no evidence, as distinct from the Appellant's subjective belief, forming a legitimate basis for that statement. In this regard, the Tribunal does not agree with the allegation of the Appellant. It is also noted that no such allegation had been made in the Grounds of appeal, and no liberty was sought by the Appellant from the Tribunal to seek to introduce additional grounds of appeal.

175. In in Bula Ltd v. Tara Mines Ltd (No. 6)[23] Denham J stated that in order for a judge to be disqualified from hearing the case several factors must exist, which would give rise to a reasonable apprehension of bias in the mind of a reasonable person, one of those factors being that such a link must be both cogent and rational. The Tribunal does not accept that the alleged link between the 2018 tweet of Tribunal Member Bill Holohan and his alleged bias, is either cogent or rational. In Kelly V UCD[24] O'Donnell CJ proposed a two-stage test for the assessment of an apprehension of bias.

1. Identification of what it is said that might lead the judge to decide the case other than on the legal and factual merits.

2. There must be the articulation of a cogent rational and logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The objector must identify the comments and the context.

[23] Bula Ltd v. Tara Mines Ltd (No. 6) [2000] 4 I.R. 412
[24] Kelly V UCD [2025] IESC 6.

In this particular instance, the comments made by Tribunal Member Bill Holohan were made in the context of a constitutional referendum, which was passed on the vote of the majority of the citizens of the State. In those circumstances, unlike the circumstances relating to Carroll J in the Dublin Wellwoman Case, where there was an extremely close connection between the external factor (previous statement of the judge) and the matter at issue (the right to provide information on abortion services), the diverse contexts in those current circumstances are entirely unconnected and there is no legal connection whatsoever.

176. The Appellant in order to be successful in its application would have to causally and not casually link comments in the May 2018 Tweets made by Tribunal Member Bill Holohan to the contention that as a Tribunal Member, Bill Holohan would deviate from determining the Appellant's Appeal on its merits i.e. whether the Appellant would fall within the statutory definition of a "charitable" organisation pursuant to section 2 of the 2009 Act.

177. In as much as Fennelly J in O'Callaghan V Mahon said that:

> *"objective bias may be established by showing that **the decision-maker** has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses",*
> (Emphasis added)

the case law relied upon by the Appellant and referred to in its Submissions refers to situations where the decision in those cases (with the exception of O'Callaghan V Mahon) was to be made by a single judge or decision maker. The subsisting Application of the Appellant relates only to Tribunal Member Bill Holohan, a single member of a statutory Tribunal consisting of and requiring participation of five members. Even taking the stance of the Appellant at the highest point, which raises a challenge against member of the five-member tribunal, there is no evidence whatsoever that the Tribunal, a statutory body of five members, would not be capable of ensuring that the Appellant receives a fair and impartial hearing.

178. To adopt the wording of Barron J in the Orange case, while noting the allegation of the Appellant that the wording of the May 2018 tweet from Tribunal Member Bill Holohan amounts to:

> *"the existence of some factor ... that constitutes a set of circumstances from which a reasonable observer might conclude that there was a real possibility that such factor would cause the*

decision-maker to seek a particular decision or which might inhibit him or her from making his or her decision impartially and independently without regard to such factor"

where, while not being the sole decision-maker, the Tribunal is not satisfied that the participation of Tribunal Member Bill Holohan would mean that the Appellant could not expect to receive from the Tribunal a decision arrived at "*impartially and independently*". To adopt the wording of McGuinness J in Bula, the Tribunal does not accept the Appellant' allegation that "*the appearance as well as the fact of impartiality*" would be absent in the event that Tribunal Member Bill Holohan were to form part of the five-person membership the five-member Tribunal hearing the Appellant's appeal.

179. Hardiman J in Goode Concrete v CRH PLC[25] made "*observations pertinent to both the burden and the standard of proof*". Hardiman J then emphasised the importance of this burden confirming that he

> *"... would accept as has been urged upon me by counsel for the defendants that for that principle to be invoked requires a very high threshold of proof in order to protect the proceedings of the many and varied tribunals that sit on a daily basis in this jurisdiction from unmeritorious allegations designed to frustrate their proceedings."*

To adopt the words of Hardiman J, the Tribunal is satisfied that the allegations made by the Appellant and their legal representative Mr. Ó Ceallaigh

180. For the foregoing reasons, the Tribunal rejects the Appellant's application that Tribunal Member Bill Holohan recuse himself from the hearing of the Appeal.

181. The Hearing of the substantive Appeal will take place on 20th November 2025.

Dated this 25th day of September 2025

Patrick O'Connor
Chairperson

[25] Goode Concrete v CRH PLC [2015] 3 IR 493.